TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 147.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

OTTO E. SLAVIN,

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED APRIL 27, 1914.

(23,637)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 6, 1914.

a In the Supreme Court of the State of Ohio.

No. 13709.

OTTO E. SLAVIN, Plaintiff in Error,
vs.
TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY, Defendant in Error.

Error to the Circuit Court of Lucas County.

RECORD.

C. H. Masters, Kohn, Northup & Morgan, Attorneys for Plaintiff in Error.
Clarence Brown, Chas. A. Schmettau, Lloyd T. Williams, Attorneys for Defendant in Error.

Filed Sep. 3, 1912. Supreme Court of Ohio. Frank E. McKean, Clerk.

1 In the Supreme Court of the State of Ohio.

No. 13709.

OTTO E. SLAVIN, Plaintiff in Error,
vs.
TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY, Defendant in Error.

Petition in Error.

(Filed July 19, 1912.)

Otto E. Slavin, plaintiff in error herein, says that at the January Term, A. D. 1912, of the Circuit Court of Lucas County, Ohio, the said Toledo, St. Louis & Western Railroad Company, defendant in error herein, recovered a judgment by the considera-
2 tion of said Circuit Court against this plaintiff in error, in a certain cause then pending in said Circuit Court wherein this plaintiff in error was defendant in error, and the defendant in error herein was plaintiff in error, and whereby said Circuit Court reversed the judgment rendered by the Court of Common Pleas of Lucas County, Ohio, in a certain cause then lately pending in said Court of Common Pleas, wherein the said Otto E. Slavin was plaintiff and the said Toledo, St. Louis & Western Railroad Company was defendant.

Said Otto E. Slavin, plaintiff in error herein, files herewith the original record, bill of exceptions and a true transcript of all the

docket and journal entries of said cause in said Circuit Court and says that in said record and proceeding of the said Circuit Court there is manifest error to the prejudice of this plaintiff in error in the following particulars, to-wit:

1. The said Circuit Court erred in rendering a final judgment against the plaintiff in error herein.

2. The said Circuit Court erred in entering a judgment reversing the judgment of the Court of Common Pleas in said cause.

3. The said Circuit Court erred in not affirming the judgment of the said Court of Common Pleas in said cause.

Wherefore the said Otto E. Slavin, plaintiff in error herein, prays that the judgment of the said Circuit Court may be reversed; that the judgment of the Court of Common Pleas in said cause
3 be affirmed, and that plaintiff in error be restored to all things he has lost by reason of the said judgment of the said Circuit Court.

OTTO E. SLAVIN, *Plaintiff in Error,*
By C. H. MASTERS AND
KOHN, NORTHUP & MORGAN,
His Attorneys.

(Waiver omitted.)

Circuit Court.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY, Plaintiff in Error,
vs.
OTTO E. SLAVIN, Defendant in Error.

Petition in Error.

(Filed July 19, 1911.)

Plaintiff in error says that at the April Term, 1911, of the Court of Common Pleas of Lucas County, Ohio, defendant in error recovered a judgment by the consideration of said court against plaintiff in error in an action then pending therein, wherein defendant in error was plaintiff and plaintiff in error was defendant, a transcript of the docket and journal entries whereof is filed herewith.

There is error in said record and proceedings in this, to-wit:
4 1. Said court erred in overruling the motion of plaintiff in error for a new trial.

2. Said court erred in its charge to the jury on the trial of said action.

3. Said court erred in refusing to give the charges asked for by plaintiff in error.

4. Said court erred in the admission of improper evidence on the part of defendant in error duly objected to at the time by plaintiff in error.

5. Said court erred in ruling out and refusing to receive proper evidence offered by plaintiff in error.

6. The court erred in overruling the motion of plaintiff in error for the direction of a verdict in its favor at the close of all the evidence.

7. The judgment is against the evidence.

8. The judgment is against the law.

9. The judgment is against the law and the evidence.

10. The damages found by the jury were excessive and were the result of passion and prejudice on the part of the jury.

11. Said judgment was given for the defendant in error when it ought to have been given for the plaintiff in error.

12. There were other errors of law occurring during the trial of this case and at the time excepted to by the plaintiff in error.

Plaintiff in error therefore prays that said judgment may be reversed and that it be restored to all things it has lost by reason thereof.

5

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,
By CHARLES A. SCHMETTAU,
LLOYD T. WILLIAMS,
Its Attorneys.

(Waiver omitted.)

Circuit Court.

Docket Entries.

1911, July 19. Petition in error and entry of appearance of deft. filed.

1912, Feb. 17. Opinion filed.

1912, Mar. 22. Judgt. of Court of Common Pleas reversed at costs of deft. in error, cause remanded for execution, deft. in error excepts. Jour. 12-93.

1912, Mar. 22. Mandate issued to Court of Common Pleas. Man. Jour. 8-57.

Journal Entries.

At a term of the above named court, begun and held on the 3rd day of January, A. D. 1912, among other proceedings had by and before said court on the 22nd day of March, A. D. 1912, being the 68th day of said term, as appears by its journal of that day were the following, viz:

On the 22nd day of March, 1912, a decision heretofore made, is now entered on the journal of this court, as follows:

This 12th day of February, 1912, this cause came on for hearing upon the petition in error, the transcript and the original

6 papers and pleadings from the Court of Common Pleas of Lucas County, Ohio, and was argued by counsel; on consideration whereof the court finds that substantial justice has not been done to the plaintiff in error, as shown by the record herein, and there is error apparent upon the face of the record to the

prejudice of the plaintiff in error, amongst other things, in that the said Court of Common Pleas erred in overruling the motion made by the defendant at the close of all the evidence for a peremptory instruction to the jury that their verdict must be in favor of the defendant, the plaintiff in error in this proceeding.

It is therefore considered by the court that the judgment of the Court of Common Pleas of Lucas County, aforesaid, be reversed and held for naught; and the court, finding that the said Court of Common Pleas should have rendered judgment for the plaintiff in error herein and proceeding to render judgment accordingly, it is ordered that the said plaintiff in error go hence without day and recover from the defendant in error its costs herein expended in said Court of Common Pleas and in this court, taxed at $—, and that a special mandate issue to said Court of Common Pleas for execution on this judgment. To all of which the defendant in error, by his counsel, then and there excepted.

No other judgments or decrees were rendered or orders or journal entries made in said cause, as appears upon the journal of said court.

(Duly certified.)

7 Court of Common Pleas.

OTTO E. SLAVIN, Plaintiff,

vs.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY, Defendant.

Petition.

(Filed Sept. 20, 1910.)

Plaintiff says that the defendant, Toledo, St. Louis and Western Railroad Company, is a corporation, owning and operating a railroad for the transportation of passengers and freight, with a portion of its line of railroad extending through a part of Lucas County, Ohio, and into and through a portion of the City of Toledo in said county, and was so owning and operating said railroad at the points aforesaid on and for a long time prior to the 19th day of August, 1910.

Plaintiff says that on the said 19th day of August, he was in the employ of defendant as a switchman and had been so employed by said defendant for a period of six days and no more, immediately prior to said 19th day of August, 1910.

Plaintiff says that on the said 19th day of August, 1910, the said defendant was maintaining as a part of its railroad system certain railroad tracks in said city of Toledo, running across West Broadway, if extended, and Orchard Street, if extended, and had con-

8 structed and laid said tracks and maintained them for a long time prior to the date aforesaid, one of which said tracks was commonly known among the employés of said company as the fourth track, and another one of which said tracks was known commonly among said employés as the fifth track. Said tracks run in

a northerly and southerly direction and said fifth track was east of said fourth track. On the day aforesaid and for more than a year theretofore, at the point where said plaintiff was injured, as hereinafter set forth, the westerly rail of said fifth track, so-called, was but six feet distant from the easterly rail of said fourth track, so-called. Said tracks at the point where plaintiff was injured were within one of the yards of the said defendant in said city.

Plaintiff says that at about the hour of nine o'clock in the evening, on the said 19th day of August, 1910, and while it was dark, while engaged in the performance of his duties as such switchman for said defendant, he was riding on the outside of a certain freight car, commonly called a gondola, which was being transported by said defendant in a northerly direction on said fourth track, and when the said gondola car had arrived at a point on said fourth track about midway between said West Broadway, if extended westerly, and said Orchard Street, if extended, westerly, across said tracks, plaintiff was violently struck by and collided with another freight car then standing on said fifth track, thereby causing plaintiff to loosen his hold on said car, and to be torn therefrom, and to be rolled along and crushed between said gondola car and said
9 freight car, so standing on said fifth track. Plaintiff was thus carried along for several feet when he fell to the ground. At the time plaintiff was being transported on said train on said fourth track he did not know of the presence of any car upon said fifth track, until he had gotten within a car length of said car with which he came into collision, after which time plaintiff did not have sufficient time or opportunity to remove himself from his said position on said gondola car to a place of safety.

Plaintiff also says that said car so standing on said fifth track was placed there by said defendant and all of said tracks were exclusively under the control of said defendant at the time aforesaid.

Plaintiff also says that on, and for many years prior to the said 19th day of August, it was customary for switchmen in the employ of railroad companies to ride upon the side of freight cars in the discharge of their duties as switchmen, at the place upon said gondola car where plaintiff was riding at the time he was so injured, and that such custom was well known to the said defendant for many years prior to the said 19th day of August, 1910.

Plaintiff also says that at the point where plaintiff was injured the distance between the said gondola car and the said car with which plaintiff collided as aforesaid, was but eleven inches.

Plaintiff says that on the date aforesaid and for more than one year theretofore the said defendant had negligently permitted said tracks to remain in such close proximity to each other and negligently permitted the use of said fourth and fifth tracks at
10 the same time by its employés, in the transportation and locating of cars, and negligently placed cars of such width on said fifth track and allowed them to remain there during the time it was using said fourth track, as aforesaid, and negligently failed and omitted to notify plaintiff of the presence of cars upon said fifth track.

Plaintiff says that on the said 19th day of August, 1910, he was able to and was earning and for a long time prior thereto was able to, and had earned as a switchman, about the sum of $100.00 per month.

By reason of said plaintiff so coming into contact with said car so standing on said fifth track, plaintiff received painful, severe and permanent injuries as follows, to-wit: Two of his right ribs were broken and placed inward, his right shoulder was severely wrenched and the ligaments thereof torn and lacerated, his upper right arm severely cut, a deep cut inflicted across the bridge of his nose, and across his cheeks, his back was severely wrenched, and plaintiff then and there received other internal injuries, the particular nature of which he is unable at this time to set forth or to ascertain, that his entire body was so injured, bruised and wrenched that he had no control over nor could he experience any sensation in the same or of any members thereof for several hours thereafter. He says that the nature of his internal injuries were such as not only to cause him great pain and suffering, but to compel him to expectorate blood; that he has continually, since the time of receiving such injuries, suffered great pain, headaches, and loss of sleep,
11 and his nervous system has been greatly injured.

Plaintiff has been compelled to incur a large indebtedness, to-wit, fifty dollars in attempting to be cured of his said injuries and will be compelled to incur large indebtedness in the future in further efforts to be so cured, in all to his damage in the sum of fifteen thousand dollars ($15,000.00).

Wherefore plaintiff prays judgment against the said defendant in the sum of fifteen thousand dollars ($15,000.00), together with the costs of this action.

C. H. MASTERS AND
KOHN & NORTHUP,
Attorneys for Plaintiff.

(Verification and precipe omitted.)

Court of Common Pleas.

Amended Answer.

(Filed Nov. 21, 1910.)

Toledo, St. Louis & Western Railroad Company, for answer to the petition filed herein, says as follows:

1. It admits that it is a corporation owning and operating a railroad extending through the City of Toledo, Lucas County, Ohio, and so owned and operated said railroad on August 19, 1910, and for a long time prior thereto, as alleged in said petition; that the plaintiff was on said 19th day of August, 1910, employed by defendant as a switchman.

12 2. Defendant denies that it was guilty of negligence as alleged in said petition, or of any negligence whatsoever causing or contributing to the plaintiff's alleged injury; denies that

said plaintiff was without fault, and denies each and every other allegation in said petition contained and not herein specifically admitted.

3. On the other hand defendant avers that the plaintiff was guilty of negligence, causing or directly contributing to his alleged injury in the following respects, to-wit:

(*a*) That said plaintiff knew the location of the said fourth and fifth tracks in defendant's yards and the distance between them, and knew that at the time of the occurrences set forth in the petition certain cars were standing upon said fifth track; that with such knowledge the plaintiff unnecessarily placed himself on the outside of a car moving upon said fourth track in such a position that he was struck by one of said cars standing upon said fifth track as aforesaid.

(*b*) That with such knowledge of the location of said tracks, the distance between them and of the presence of cars upon the fifth track, the plaintiff, whilst in a dangerous position upon a moving car upon the fourth track, in which position, as aforesaid, he had voluntarily and unnecessarily placed himself, failed to exercise reasonable care in observing his surroundings, by reason whereof he was struck by a car standing on said fifth track.

(*c*) That with such knowledge as aforesaid of the location of said tracks, the distance between them and of the presence of
13 cars upon said fifth track, the plaintiff, although not required to do so in the performance of his duties and of the work assigned to him, voluntarily placed himself in a highly dangerous position upon a moving car upon said fourth track, by reason whereof he was struck by a car upon said fifth track.

(*d*) Other acts upon the part of the plaintiff constituting contributory negligence on his part, which will appear from the testimony of the plaintiff and other witnesses in this cause, of the nature of which acts the defendant is not at present sufficiently advised to enable it to specifically describe them in this answer.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,
By CLARENCE BROWN AND
CHAS. A. SCHMETTAU,
Its Attorneys.

(Duly verified.)

Court of Common Pleas.

Motion to Strike Out of Amended Answer.

(Filed Nov. 23, 1910.)

Now comes the plaintiff in the above cause and moves the court for an order to strike out of the amended answer herein the last paragraph therein contained, to-wit:

"(*d*) Other acts upon the part of the plaintiff constituting contributory negligence on his part, which will appear from the testi-

mony of the plaintiff and other witnesses in this cause, of the
14 nature of which acts the defendant is not at present sufficiently advised to enable it to specifically describe them in this answer," for the reason that said words and allegations are immaterial and irrelevant and the setting forth of the same in said amended answer is contrary to the order of the court heretofore made herein.

C. H. MASTERS AND
KOHN & NORTHUP,
Attorneys for Plaintiff.

Court of Common Pleas.

Reply to Amended Answer.

(Filed Dec. 10, 1910.)

Now comes Otto E. Slavin, plaintiff in the above cause, and for reply to the amended answer herein, denies each and every allegation in said amended answer contained, excepting only the admissions set forth in said amended answer of the truthfulness of certain allegations in plaintiff's petition contained.

C. H. MASTERS AND
KOHN & NORTHUP,
Attorneys for Plaintiff.

(Duly verified.)

Court of Common Pleas.

Motion for a New Trial.

(Filed March 23, 1911.)

Comes now the defendant and moves the court to set aside the verdict heretofore rendered herein and grant a new trial of
15 this cause for the following reasons, to-wit:

1. The court erred in admitting improper evidence on the part of the plaintiff over the defendant's objection.
2. The court erred in refusing to admit proper evidence offered by the defendant.
3. The court erred in overruling the motion of the defendant for the direction of a verdict in its favor, made at the close of all the evidence.
4. The court erred in refusing to give to the jury the instructions requested by the defendant.
5. The court erred in its charge to the jury.
6. The verdict is against the evidence.
7. The verdict is against the law.
8. The verdict is against the law and the evidence.
9. The damages found by the jury are excessive and are the result of passion and prejudice on the part of the jury.

10. Other errors of law occurring during the trial of this case and at the time excepted to by the defendant.

TOLEDO, ST. LOUIS & WESTERN
RAILROAD COMPANY,
By CHAS. A. SCHMETTTAU,
LLOYD T. WILLIAMS,
Its Attorneys.

Common Pleas Court.

Docket Entries.

1910.

Sept. 20. Petition and præcipe filed. Summons for defendant issued and delivered to sheriff. (Ans. Oct. 22, 1910.)

16 Oct. 3. Summons filed, endorsed as follows, viz: Received this writ September 20th, 1910, and pursuant to its command, I summoned on the 28th day of September, 1910, the within named defendant, Toledo, St. Louis and Western Railroad Company, by delivering to A. W. Shean, general agent of said company, a true and certified copy of this writ, with all endorsements thereon. The president or other chief officers of said company could not be found by me in Lucas County, Ohio. J. C. Newton, Sheriff. By B. H. Thompson, Deputy. $1.30.

Oct. 20. Answer filed.

Oct. 29. Motion to make answer more definite and certain filed.

Nov. 7. Above motion granted, deft. to file amended answer by Nov. 19. Deft. excepts. Jour. 157-487.

Nov. 21. Amended answer filed.

Nov. 23. Motion to strike out of amended answer filed.

Dec. 6. Above motion granted by consent. Jour. 157-564.

Dec. 10. Reply to amended answer filed.

1911.

Mar. 15. Præcipe filed. Subpœna for two witnesses issued behalf plff.

Mar. 15. Præcipe filed. Subpœna for five witnesses issued behalf plff.

Mar. 15. Præcipe filed. Subpœna for five witnesses issued behalf plff.

Mar. 15. Præcipe filed. Subpœna for five witnesses issued behalf plff.

17 Mar. 17. Præcipe filed. Subpœna for one witness issued behalf plff.

Mar. 17. Jury empaneled and sworn, stenographer ordered. Jour. 160-331.

Mar. 21. Five subpœnas filed on behalf of plff. Fees $10.60.

Mar. 21. Verdict for plff. for $3,000.00. Jour. 159-507.

Mar. 23. Motion for new trial filed.

June 26. Plff. remits $500.00 from verdict; above motion overruled; deft. excepts; judgment as above stated and for costs; deft. excepts and allowed 40 days to file bill of exceptions. Jour. 161-377.

July 1. This day there was shown me a paper writing of which the following is a true copy, viz:

In the Court of Common Pleas, Lucas County, Ohio.

Assignment.

For a valuable consideration I hereby sell, assign, transfer and set over to Charles S. Northup and Charles H. Masters and their assigns, the undivided one-half interest in the judgment rendered in my favor in the above case.

OTTO E. SLAVIN.

Toledo, Ohio, June 30th, 1911.

Attest:
ED. L. KIMES, Clerk.

July 19. Defendant's bill of exceptions filed.
July 19. Notified Masters, Kohn & Northup by letter under seal.
18 July 19. Proceedings in error seeking to reverse judgment in Common Pleas Court instituted in Circuit Court. See No. 2694, C. C.
July 20. Supersedeas bond filed.
July 31. Bill of exceptions delivered to Hon. C. T. Johnson.
July 31. Bill of exceptions received from Hon. C. T. Johnson.

Journal Entries.

At a term of the above named court, begun and held on the 19th day of September, A. D. 1910, among other proceedings had by and before said court on the 7th day of November, A. D. 1910, being the 42nd day of said term, as appears by its journal of that day, were the following, viz:

This day this cause came on to be heard on the motion of plaintiff for an order to require the defendant to make its answer herein more definite and certain, and was submitted to the court; on consideration whereof it is ordered that the said motion be, and the same hereby is granted, and the said defendant is ordered to set forth in its said answer in what particular the plaintiff was guilty of negligence, causing or directly contributing to his injury, and by setting forth the particular negligence of which plaintiff is alleged to have been guilty, and on motion of defendant, it is ordered that the said defendant have leave to file its amended answer herein on or before the 19th day of November, 1910. To the granting of which said motion the said defendant, by its counsel, duly excepts.

19 On the 6th day of December, 1910, being the 66th day of the September term, 1910, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

This day this cause came on to be heard on the motion of plaintiff for an order to strike out of the amended answer herein the last paragraph thereof, and was submitted to the court; on consideration whereof and by consent of defendant it is ordered that said motion be, and the same hereby is granted and the following words and allegations are hereby stricken out of said amended answer, to-wit:

"(*d*) Other acts upon the part of the plaintiff constituting contributory negligence on his part, which will appear from the testimony of the plaintiff and other witnesses in this case, of the nature of which acts the defendant is not at present sufficiently advised to enable it to specifically describe them in this answer."

On the 17th day of March, 1911, being the 64th day of the January term, 1911, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

This cause coming on to be heard, a jury was impaneled and sworn. Thereupon it is ordered that a stenographer report the evidence.

On the 21st day of March, 1911, being the 67th day of the January term, 1911, a verdict in said cause was rendered, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

20 This day this cause came on to be heard, a jury being called, one came, to-wit: T. J. Collins, John Duggan, J. M. Daniels, James J. Fagan, W. A. Graham, Fred Jacoby, James Kelley, Henry Munday, C. A. Reynolds, Louis Reeve, W. R. Sinclair, W. J. Taylor, who, being duly empaneled and sworn, and being fully advised in the premises, report the following verdict:

Court of Common Pleas, Lucas County, Ohio. We, the jury empaneled in the above entitled action, for verdict find and say that we find for the plaintiff and assess his damages in the sum of $3,000.00. W. R. Sinclair, Foreman.

On the 26th day of June, 1911, being the 71st day of the April term, 1911, a judgment in said cause was rendered, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

This day this cause came on for hearing upon the motion of the defendant for a new trial, and thereupon the court, being fully advised in the premises, finds that the damages assessed by the jury herein are excessive, and that there is no other error in the record. And the court, finding that the verdict should have been for the sum of $2,500, instead of $3,000, it is ordered that unless the plaintiff will remit from his verdict the sum of $500, the said verdict shall be set aside, to all of which the plaintiff, by his attorneys, then and there excepted.

And thereupon comes the said plaintiff and consents to said remittitur, and the same being made, the motion for a new trial is overruled, to which ruling the defendant at the time excepted.

21-26 It is therefore considered, ordered and adjudged that the plaintiff have and recover a judgment against said defendant in the sum of two thousand five hundred dollars ($2,500.00) with interest from the first day of the present term of this court and for his costs herein, taxed at $— for which said judgment and costs execution is awarded.

To all of which the defendant then and there excepted. And upon motion of defendant, it is granted forty days to file its bill of exceptions herein.

No other judgment or decrees were rendered or orders or journal entries made in said cause, as appears upon the journal of said court.

(Duly certified.)

Court of Common Pleas.

Defendant's Bill of Exceptions.

TOLEDO, OHIO, March 17th, 1911.

Be it remembered, that on the 17th day of March, A. D. 1911, this cause coming on to be heard before Hon. Curtis T. Johnson, one of the judges of the Court of Common Pleas of Lucas County, Ohio, and a jury, the following proceedings were had, to-wit:

Defendant's counsel asked that the witnesses herein, except the one testifying at the time, he excluded from the court room.

Granted.

The plaintiff, to sustain the issues on his part, offered evidence as follows:

* * * * * * *

27 OTTO E. SLAVIN further to maintain the issues on his part was himself called and sworn as a witness and testified as follows:

Direct examination.

By Mr. MASTERS:

Q. Tell the jury your name?
A. Otto Slavin.
Q. Where do you live?
A. I live in the Lexington, on 10th Street.
Q. Last August where did you live?
A. At 740 Thayer Street.
28 Q. How long had you been living at that particular place?
A. About four years.
Q. At that time what was your employment?
A. Switchman for the Clover Leaf—The Toledo, St. Louis & Western.
Q. How long had you been working as switchman for the Clover Leaf?
A. Six days, seven days, all together, but they laid me off one day, which made six.

Q. Prior to that time what had been your occupation?
A. I had been down at the boat-house—working down at the boat-house.
Q. Tell the jury where the Clover Leaf yards are?
A. Up at South Street, in between South Street and the C. S. Junction.
Q. Tell the jury what your health was and your ability to work prior to August 19th?

(Objected to; overruled; defendant excepted.)

A. My health was in good condition prior to the accident.
Q. What were you earning on the 19th of August last and prior thereto?

(Objected to by defendant on the ground that there is no claim for loss or damage to his earning power or that he has been unable to work.)

The COURT: While it is not specifically pleaded, it is alleged that before that time he earned a hundred dollars a mo[illegible].

Mr. SCHMETTUA: Certainly, but there is no allegation on which to recover for loss of earning power, on which it could be based; the mere fact that before the accident he earned a hundred dol-
29 lars, that is not an allegation entitling him to prove that he does not earn that now and cannot earn that.

Mr. MASTERS: It will be for the jury to say whether he is competent to earn money, or not, after showing the permanency of the injuries.

The COURT: I think it is for the jury to say what the injury generally alleged in the petition may be, his damage consequent upon that, but when you go into the earning power it is a special matter; I will permit you to prove the allegations of your petition.

Mr. MASTERS:

Q. On the day of your injury and prior to that what were you earning?
A. A switchman earns $120 to $125 a month.

(Answer objected to and taken from the jury on motion of defendant.)

Q. Tell the jury what you were earning at that time?
A. Do you mean before I went to work there?
Q. How much were you making?
A. When I was working?
Q. Yes?
A. Well, a switchman gets $3.50 a day.
Q. Were you getting that?
A. Sure I was expecting to get $3.50 a day.

(Answer objected to and stricken out on motion of defendant.)

Q. What in fact, were you getting?
A. $3.50 or $3.40.

Q. At that time and prior thereto what was your condition as to being able to work every day?

A. My condition was all right.

30 Q. Since August 19th, what have you been able to do about work?

(Objected to.)

The COURT: You may give his injuries and the nature of them and their permanency.

Mr. MASTERS:

Q. Since that time have you done any manual labor?

(Objected to; sustained; plaintiff excepted and offered to prove by the witness that he has not been able to do anything since.)

Q. Mr. Slavin, at the time you were injured and prior thereto, you may tell the jury what the general custom was in the Clover Leaf yards, if any, as to where the switchmen rode upon the trains?

(Objected to as immaterial; overruled; defendant excepted.)

A. Switchmen are supposed to ride where the engineer can see them, right on the right hand side of the train as a general rule that is where they ride in the yard. They do all their work on the right hand side, and that is the side the engineer is on.

Q. And on this evening what side of the car were you riding on?

A. On the right hand side.

Q. Not where the switchman is supposed to ride, but what was the custom on the 19th of August and along prior thereto, if you know, as to what side of the car the switchmen rode upon?

A. On the right side.

Q. Whereabouts on the car?

A. Hanging onto the stirrups and the hand-holds, is where you get on.

Q. What were the "hand-holds" and "stirrups?"

A. The stirrup is the place you step your foot into; the hand-holds are up a little higher; they are called hand-holds or grab-holds.

31 Q. At that time, on this evening, were you carrying a lantern?

A. Yes.

Q. What use was the lantern put to by switchmen in the line of their business?

(Objected to; overruled; refendant excepted.)

A. To give signals to the engineer.

Q. On what side of the train does the engineer ride?

A. On the right side.

Q. On the evening of the 19th upon what train were you in the Clover Leaf yards and upon what track in those yards?

A. We pulled in on No. 4.

Q. Which way were you going with the train?

A. We was coming north.

Q. Who constituted your crew, what were the names of the engineer, fireman and brakeman?

A. Engineer, George Hine; I forget who the fireman was; the conductor was Jim Mills, and the other switchman was Chester Mack, besides myself.

Q. Now what happened to you that night; tell the jury about it?

A. What do you mean?

Q. Tell what injury, if any, you received and where it was and just how you were hurt?

A. We was coming in from Copeland, a little place three miles out from here and when the train was coming in I got onto the train and was riding down through the track that train went down on and in going by a car there was something sticking out from the car and that broke my hold; it swept me back and squeezed me and I went rolled along in there, how many times I don't exactly know, but anyhow, when I came to a car I fell down in between; that is all I knew for a while. I tried to holler but I couldn't holler, I couldn't raise my voice at all. I laid there, I
32 don't know how long, and finally I saw a light coming down on the other side of the track, under the cars, and I was going to holler to that fellow to come over and I couldn't raise my voice. So he walked down about a couple of car-lengths, I don't know just how far, but at any rate he came back; not that he knew I was there or anything; I was going to holler to him and I couldn't raise my voice and he was going back, and finally I raised my voice and he came over to me and at that he went down and got the rest of the crew—he looked under the cars.

Q. While lying there, what if anything did you do towards trying to move any part of your body?

A. I was lying so close to the track, I tried to move but I couldn't—couldn't move, the cars were so close, you know, the wheels.

Q. What kind of clothing did you have on that night?

A. A pair of black pants, a black vest, blue shirt and black slouch hat.

Q. Have you that clothing here?

A. Yes, sir.

Q. Where is it?

Mr. SCHMETTAU: We object to the clothing, it is irrelevant and immaterial; the condition of the clothing would have no bearing.

The COURT: If you admit the injury, so that there is no occasion of proof, that is one thing; but you deny it and they are entitled to prove it.

Mr. SCHMETTAU: We will save an exception.

33 Mr. MASTERS:

Q. I hand you this article and you may state what this is?

A. That is the shirt I wore.

(Marked for identification Exhibit No. 1.)

Q. Where has it been ever since August 19th?

A. Hung away.
Q. Has anything been done to it whatever since that time?
A. No, sir.
Q. What if any difference is there in its condition now and on the 19th of August, when you received this injury?

(Objected to; sustained; plaintiff excepted.)

Q. What sleeve is this as to being the right or left?
A. This is the right.
Q. You say something caught your arm and pulled you off?
A. Yes.
Q. Look at that (Exhibit No. 1), is that right arm of the garment the same as it was the night that you were injured, or not?

(Objected to; overruled; defendant excepted.)

A. Yes; before I was injured it was not like that; but it is in the same condition as it was then—when I was injured.
Q. Before you were injured had there been any spots on the garment?
A. No, sir.
Q. Were there any of these red marks upon it?
A. No, sir.
Q. Do you know how long you lay there on the ground after being thrown off?
A. I could not tell.
Q. Do you know about what hour of the night it was that you fell off the train, as you state?
A. Five minutes after nine.
34 Q. What was the condition of the weather at that time, as to being light or dark?
A. It was very dark.
Q. What was the condition of your lantern before you were injured?

(Objected to.)
The COURT: He may state whether it was shining or not.

Mr. MASTERS:

Q. Did you have your light lit?
A. Yes, sir.
Q. Was your light on your lamp broken in any way before the accident?
A. No, sir.
Q. All in good condition?
A. Yes, sir.
Q. How soon did you see your lantern after the injury?
A. About a month.
Q. Do you know what became of it after the injury—who, if anybody, took charge of it?
A. Yes, sir.
Q. Who had it?
A. It was locked up in the switch shanty.

Q. Do you know who locked it up?
A. I do not.
Q. Do you know who got it from there?
A. Yes, sir.
Q. Who got it?
A. Squires, he gave me the key and I got it myself.
Q. Did you recognize it as your lantern?
A. Yes, sir.
Q. Have you that lantern here?
A. Yes, sir.
Q. When you fell off the train what if anything do you know as to what became of your lantern—whether it was broken, or what, by the fall, do you know?
A. No—only what they told me.
35 Q. Can you tell the jury what part of your body was injured?
A. Yes, sir.
Q. Describe it to them?
A. I was cut across the face, and my muscles cut; I had this ligament all torn, in the shoulder here.
Q. The ligament of which shoulder?
A. The right shoulder; everything was on the right side.
Q. Were you cut across the nose?
A. Right across here. (Indicating).
Q. Do you know how deep that cut was across the nose?
A. No, sir.
Q. Witness requested by his counsel to step from the witness stand to the front of the jury box.

Mr. MASTERS: The jury will kindly look at the nose, and this scar up here.

Q. How deep a cut was it upon that right arm?
A. It was lacerated.
Q. Now, what if anything else about your person—where else were you injured—if you know?
A. I had two ribs broken, and was hurt on the hip here and up a little bit higher, two places there, and I had my back hurt.
Q. On your right side?
A. Yes; it left me very nervous.
Q. How long did you remain in bed?
A. Two weeks.
Q. During that time you may tell the jury what your condition was?
A. When I was in bed?
Q. Yes?
A. Well, I couldn't tell——
36 Q. Take it for the first week or two?
A. Well, I suffered intense pain all the time.
Q. Who, if any one, was permitted to come to the house?
A. There were several permitted to come to the house, but finally they wouldn't permit anybody to come in to see me.

(Answer objected to and the same stricken out on motion of defendant.)

Q. Do you know who took you home?
A. Yes, sir.
Q. Who?
A. Chester Mack and Jim Mills, that is the conductor, and Billy Teal—Teal and Skiver.
Q. How did they take you home?
A. They didn't have any stretcher or anything there to put me on and they went to work and got an old ladder and put a couple of boards over it and I had to sit on it, I couldn't lie down, I was suffering so.
Q. About how far was this point where you were from the house?
A. About six blocks.
Q. When you first got home who was at your house?
A. There was nobody there just at that time.
Q. Do you know when your wife came?
A. Yes, sir.
Q. What if any doctor first came to call on you?
A. Dr. Souder.
Q. What did he do?
A. He came and made an examination of me and he had an automobile there and he jumped into his automobile and said he had to go down and get the adhesive plaster and put it on and he came back and put it on.

37 Q. What if anything did Dr. Souder say to you that night about your having any broken ribs?

(Objected to; sustained; plaintiff excepted.)

Q. Now, what did the doctor do when he came back after he had gone away in his automobile?
A. He strapped me up in the adhesive plaster and then they washed me off and they took me to bed.
Q. How far up and down your body did those adhesive plasters extend?
A. I think about eleven or twelve inches; there was three of them.
Q. How long was that adhesive plaster kept on—the one that Dr. Souder put on?
A. About four weeks or a little better.
Q. Then what became of that?
A. It was removed and another one put on me.
Q. Who put that on?
A. Dr. McGinniss.
Q. Aside from Dr. McGinniss and Dr. Souder, who, if any other doctor, treated you?
A. Dr. Wright and Dr. Moots.
Q. Prior to your injury had you been expectorating blood?
A. Not before the injury; no, sir.
Q. Since your injury what has been the result in that regard?
A. I have been raising blood right along, but not so much.
Q. When did you last raise blood?

A. Yesterday morning.
Q. When you raise blood, as you speak of, what if any pain do you suffer?
A. I always have pain here—in the right side.
38 Q. How constantly is that pain?
A. All the time.
Q. Do you know whether your nose was broken?
A. I don't know whether it was or not; they said it was.

(Defendant objected to answer and move- to strike it out; denied; exception by defendant.)

Q. What do you do about putting on or taking off your clothing?
A. My wife assists me all the time in putting on my coat.
Q. Are you able to do it yourself?

(Objected to; overruled; defendant excepted.)

A. Well, I can put on this coat myself, but the overcoat is too heavy.
Q. What is your ability as to moving your right arm—to raise it up—since the injury?

(Objected to; overruled; defendant excepted.)

A. I can raise it upright, like that, but when I get it up too high, it hurts me right under here. (Pointing.)
Q. Well, show the jury how far you can raise it without paining you, or not?

(Objected to; overruled; defendant excepted.)
(Witness raised his arm in response to question.)

Q. What if any pain have you experienced since the injury in any other portion of your body—your back, for instance?
A. Yes, my back pains me continually.
Q. Now, Mr. Slavin, you said that these yards are located, beginning at South Street?
A. Between South Street and the C. S. Junction.
Q. In Toledo?
A. Yes, sir.
Q. How many tracks have they there in those yards, if you know?
A. I believe they have got about 14, 13 or 15 parallel,
39 I think.
Q. Which track were you riding on on the night when you were injured?
A. No. 4 track.
Q. You began to number on what track?
A. On the Main Line.
Q. That is the track that the passenger trains go through on?
A. Yes, sir.
Q. And this track that you were on was the 4th track east of the Main Line?
A. Yes, sir.
Q. And the track that this car was on with which you collided, what track was that?

A. No. 5.

Q. If you please you may state at what point of those yards it was that this collision took place and where you fell off the car?

A. It was between Orchard Street and West Broadway—I should judge about the center between the streets, about the center way.

Q. How near to this point, if you know, was there a switch?

A. The switch is 600 feet south, a little better than 600 feet.

Q. So that the point where you were injured was about how far from this switch?

A. 636 feet, or something like that.

Q. When, if at all, did you make any measurement of the distance between the 4th and 5th tracks, at the point where you were injured, after the injury?

A. It must have been about a month after.

Q. Who, if any persons, were present with you?

A. George Earnest and Gillsdorf—I think that is the name.

Q. Did you make any measurements at any other time?

A. Yes.

40 Q. Who was present and when was that?

A. George Earnest was with me that time; that was about three weeks ago I should think.

Q. Did you make any measurements at any other time between those two times?

A. I stepped it off.

Q. I call your attention to the time that particular distance was measured between the 4th and 5th tracks, when were the measurements taken after this first time that you speak of?

A. It must have been about a couple of months; I don't just remember.

Q. Who were present at that time, if you remember?

A. George Ernest and myself.

Q. Do you recollect an occasion when you were there and four or five people at that time measured it?

A. Well, that was about four or five weeks after I was hurt

Q. Do you recall in January when Mr. Rhemhoff and Mr. Ernest and Mr. Schaffer and one or two more, were there?

A. Yes, sir.

Q. There were measurements taken?

A. Yes, sir.

Q. Tell the jury what the distance was between those two tracks where you were injured?

A. Right between the tracks there was about six feet and a half an inch or an inch.

Q. What tracks do you mean?

A. Between 4 and 5.

Q. At the point where you were injured?

A. Yes, sir.

41 Q. What, if any measurements did you make at that time or at the time you were first there of the different types of cars which were used in that yard; were there any measurements taken?

A. Yes, sir.

Q. Were there any cars measured by you and each of the other parties?
A. Yes, sir.
Q. What types of cars were measured?
A. Boxcars and gondola cars.
Q. State whether they were standard cars used upon that road, or not?
A. Yes, they were all standard cars.
Q. Now, take the gondola cars, tell the jury what measurements you did make?
A. Well, we measured from the switch down to where I was injured and measured the distance between both tracks, between No. 4 and 5, and then we measured underneath a car, and like that, and from there had to get the measurements in that way. There was no cars standing there when we went over to measure.
Q. What kind of cars were there?
A. Gondolas; and we measured other cars, too, stock cars and box cars.
Q. Take a gondola car; what were the measurements?

(Objected to.)

The COURT: There is nothing to show that the cars which were measured were of the type and width.

Mr. MASTERS:

Q. What, if any difference is there between the ones you measured and the ones you were riding on?

(Objected to.)

42 The COURT: He may tell what were the sizes of the cars he was riding on on the night he was injured, if he can.

Mr. MASTERS:

Q. Can you tell?
A. I cannot tell the car I was on, no.
Q. Do you know what the gauge of the tracks were in the yard?
A. No, sir.
Q. I mean between the rails of the same track?

The COURT: I will take judicial notice that railroads are 4 feet 8½ inches.

Mr. MASTERS:

Q. Do you know what the width of a standard gondola car is?
A. No, sir.
Q. What do you understand by railroad yards?
A. It is a place for storing cars and making up trains.
Q. And were these that kind of yards?
A. Yes, sir.
Q. And the place where you were hurt was within the yards?
A. Yes, sir.
Q. I wish you would show the jury your right arm; remove your shirt down far enough so they can see it?

(Witness complied.)

Q. Now, that point across where this red mark is, what made that?

A. That is where I was hurt.

Q. And this track that you were on that night, did that run into the main track or in a dead *h*ead?

A. It ran into a lead; that is a track that runs down into
43 the yard and then there are other tracks that branch off from that.

Q. I believe I asked you how far this point was from the switch and you said about 630 feet?

A. Something like that.

Q. And where north of that was there any switch?

A. There was a switch down about ten or twelve car-lengths, something like that.

Q. This point where you were injured, was it a straight track?

A. Yes, sir; there was no point there.

Q. When you were riding upon the car there, tell the jury just your position as near as you can where you stood?

A. I was standing on the stirrup, like that, hanging on; I was standing on the stirrup, the way a switchman is supposed to ride.

(Motion by defendant to strike out last line of answer; granted.)

I was standing right up straight by this car and I was going to get in and caught something with me.

Q. Before you was hurt, how long had you seen this big stock car that struck you?

A. I didn't see it at all.

Q. Do you know what part of this stock car struck you?

A. No, sir; I don't believe I do.

Q. You don't know which part of it?

A. No, sir.

Q. How old are you?

A. 35.

Q. When was your last birthday?

A. The 10th of April last year.

Q. Prior to your injury, prior to those days that you were there, what were you doing?

A. Working down for my brother who was running a boat house.

44 Q. You had been in the employ of the Company before?

A. Yes, sir.

Q. At that time what were your duties?

A. Engineering.

Q. Any other occupation besides engineering?

A. Well, I was firing and running, both, when there was nothing better to do, running, I was firing.

Q. What, if anything had you done about switching cars in that yard previous to that time?

A. I hadn't been doing anything in the yard only running an engine, that is, before I went to ditching.

Q. So that your switching experience was made up of these six days that you were there?
A. Yes, sir.

Cross-examination.

By Mr. SCHMETTAU:

Q. How long had you been railroading before this accident?
A. I was about ten years or something like that, or a little better.
Q. What had you done as to railroad work?
A. I have worked from wiping an engine to running an engine.
Q. How long did you run an engine?
A. Five or six years, off and on, extra.
Q. And you had worked as a fireman?
A. Yes.
Q. How long have you worked as a fireman?
A. I should judge about three or four years, something like that.
45 Q. You entered service of the Clover Leaf as fireman on December 20th, 1900, didn't you?
A. I didn't enter as a fireman; I entered as a wiper.
Q. When did you become a fireman?
A. About that time. I forgot just when it was.
Q. Ain't it a fact that on December 20th, 1900, you became a fireman?
A. Yes, I think that is about the time.
Q. And on October 3rd, 1903, you were promoted to engineer?
A. Yes, sir.
Q. And then from that time until January 7th, 1910, you worked both as fireman and engineer?
A. Yes, sir.
Q. And then you left the service——
A. I was discharged.
Q. And then August 13th, 1910, you were re-employed as a switchman?
A. Yes, sir.
Q. During these years that you worked as fireman and engineer you worked in the Toledo yards, did you not?
A. Yes, sir.
Q. What engines were you working on?
A. At the time I was injured?
Q. No; during the time that you worked as fireman and engineer in the Toledo yards, what engine did you run?
A. I ran a great many of them.
Q. How many engines were there where you worked in these yards?
A. Three, at the time I was hurt.
Q. Prior to that?
A. There had been two or three right along.
46 Q. And those engines worked all over those yards, did they not?

A. Yes, sir.

Q. They would go in and out of all these different tracks, wouldn't they, as occasion demanded?

A. Yes, sir.

Q. And these tracks that you speak of in the yards: one, two, three, four and five, had been there for a number of years, had they not?

A. Yes, sir.

Q. How long to your knowledge?

A. They were there as long as I was there.

Q. In fact at the time you were hurt the yards were just about the same as they were when you started, weren't they?

A. I don't know that they were just the same, whether they were wider, or narrower, or what; I have never noticed any difference.

Q. These engines that you worked on as engineer and fireman were switching engines?

A. Yes, sir.

Q. There was an engine they used and called the Bum-engine?

A. Yes, sir.

Q. What work did that engine do?

A. Whatever the yardmaster wanted—what they called "bum work."

Q. That is, it went anywhere on the yards where they needed it?

A. Yes, sir.

Q. What do you mean by "bum work"?

A. Everything that the yardmaster wanted it to do.

Q. It was the same as a "tramp?"

A. Yes.

Q. Have you run that engine?

A. Yes.

Q. How long have you run it?

A. Off and on six years.

47 Q. As engineer and fireman?

A. Yes, sir.

Q. Both, in these yards?

A. Yes, sir.

Q. And on these same tracks four and five?

A. Yes, sir.

Q. When you were engineer of course you took signals from the switchman?

A. Yes, sir.

Q. And to do that you would have to watch where the switchmen were on the train?

A. Yes, sir.

Q. And you did watch, didn't you?

A. Yes, sir.

Q. And you did that when you were working on these tracks four and five?

A. Yes, sir.

Q. And when you were working on this engine did you ever take cars off from these tracks and deliver them on these tracks?

A. Yes.

Q. And pull trains through them?
A. Yes, sir.
Q. At daylight?
A. Yes, sir.
Q. And at night?
A. Yes, sir.
Q. Now, when you went to work as a switchman in August, 1910, what engine did you start working on?
A. With the Bum engine.
Q. With this same Bum engine?
A. Yes, sir.
Q. One of the runs this engine was also making was to go out to Copeland and get those cars?
A. Yes.
Q. And another thing that the engine always did was to push "45" out?
A. Yes, sir.
Q. What tracks did they usually make up "45" on?
A. On four and five.
Q. And then the Bum engine would shove the train out?
A. Yes, sir.
48 Q. Which way?
A. West.
Q. You have talked about North and South?
A. Well, that is South.
Q. Had you done that on the evening before you were hurt?
A. Yes, sir.
Q. Where were you in doing that part of the work?
A. I don't remember.
Q. But you were on the train somewhere?
A. Yes.
Q. Around about it—did you take a part of that train off of track four that night?
A. Yes, sir; we shoved "45" out of track four.
Q. Now the other nights that you worked as switchman with the Bum engine did you shove "45" out of those tracks?
A. I think we did.
Q. And it was your duty, was it not, to give signals to the engineer?
A. Yes, sir.
Q. Which way was the engine headed when you did that work?
A. It was heading North and South—the head was North.
Q. So that it headed at those times just the same as it was headed when you were hurt?
A. Yes, sir.
Q. They never turned the engine?
A. No, sir.
Q. And the other nights you worked there as switchman did you bring any cars from Copeland?
A. Yes they came on No. 1 and No. 2.
Q. Do you know how far No. 1 and No. 2 are apart?

(Objected to as immaterial; overruled; plaintiff excepted.)

A. Do you mean between them?
Q. Yes; between those?
A. No, sir.
49 Q. Did you ever measure them?
A. No, sir.
Q. Did you measure between 3 and 4?
A. No, sir.
Q. Or between 5 and 6?
A. No, sir.
Q. So the only place you ever measured was between 4 and 5?
A. Yes, sir.
Q. You were at work upon all these tracks while the engine was working there?
A. Yes.
Q. You say that it was customary for the switchmen to ride on the side of the cars?
A. On the right side of the cars, yes.
Q. Where was your other switchman riding at the time you were hurt?
A. I didn't see him.
Q. Don't you know that he was on top of the train?
A. I didn't see him.
Q. Don't you know that he was on top of a car?
A. No.
Q. Did you ride on the side of the car all the way from Copeland?
A. No, sir.
Q. When was it that it was customary to ride on the side of the car?
A. Why, it is customary to ride on the side of cars to give the signal to the engineer; I was there in case I had to.
Q. The other brakeman was ahead of you on the cars, was he not?
A. I don't know where he was.
Q. Where was the conductor?
A. I don't know.
Q. Where was the train going when you were hurt?
A. Going down through No. 4.
Q. Where was it going to?
A. It was going to stop there to clear the other tracks; they always left that cut of cars in the clear.
50 Q. On what track did they leave the cars?
A. On No. 4.
Q. Did they leave them there every night?
A. Not every night.
Q. Did they often leave them there?
A. I don't know; I had been working there only six days.
Q. How often had they left them on No. 4 while you were there?
A. Not that I remember once.

Q. You had been on No. 4 and No. 5 when you worked there before?
A. Yes, sir.
Q. Did you ever bring any cars from Copeland onto that track?
A. I don't remember.
Q. Who worked with you on the Bum engine when you were running as engineer, who was your switchmen and conductor?
A. I don't know that no more.
Q. Was it Pinney?
A. Yes; he worked with me.
Q. Do you know Skiver?
A. Yes, sir.
Q. He had worked with you, had he not?
A. Yes, sir.
Q. And Mack, did he work with you?
A. He worked with me while I was running the engine.
Q. Did he work with you these six days?
A. Yes.
Q. How about Mills?
A. Mills worked with me too when I was switching, but he never worked with me when I was running the other engine, that I remember.
Q. How close were you to the side of this car that night when something hit you, the car that you were riding on?
A. As close as I could get.
51 Q. You say you were standing and riding upon the car upon the same place where it was customary to ride?
A. Yes, sir.
Q. You say it was customary for them to ride down all of these tracks on the side of the car?
A. Yes, sir.
Q. All of these tracks had more or less cars on them, didn't they?
A. Yes, sir.
Q. And the yard was pretty full nearly all the time, was it not?
A. Yes.
Q. And tracks four and five were used all the time for putting cars on, were they not?
A. Yes.
Q. And on those tracks it was also customary for switchmen to ride on the side of the cars in the position you did was it not?
A. Yes, sir.
Q. How much room was there between those tracks if you know?
A. Well, I didn't measure it myself.
Q. But you say you were struck while you were in the ordinary position that switchmen occupied, you were struck?
A. I was in my position?
Q. Yes?
A. Yes, sir; I was.
Q. In just the same position—you had worked there ten years, had you?
A. Yes.

Q. What was it that hit you?
A. Something on the side of the car, I don't know what it was.
Q. How do you know?
A. Because it caught me; I was standing with my foot in the stirrup facing the car I was on.
Q. Did you see the other car?
A. Not until I got right up to it.
52 Q. How far away was it when you first saw it?
A. I didn't see it right away; but just as we was going by the first car something struck me and caught me hard.
Q. How long had you seen that car before it struck you?
A. I didn't see it.
Q. You didn't see it at all until something struck you?
A. No, sir.
Q. I want to show you the petition in this case and show you the signature on the last page, is that your signature?
A. Yes.
Q. You swore to this before a Notary?
A. Yes.
Q. And whatever is stated in that petition is true, isn't it?
A. Yes.
Q. Now I will call your attention to this part of the petition: "At the time plaintiff was being transported on said fourth track he did not know of the presence of any car upon said fifth track until he had gotten within a car-length of said car with which he came in collision, after which time plaintiff did not have sufficient time or opportunity to remove himself from his said position on said gondola car to a place of safety"; is that true?
A. Yes.
Q. Then you did see the car before it struck you?
A. I only saw the first car.
Q. But you had passed one car, had you?
A. Yes.
Q. Then you did actually pass one car before you were struck at all?
A. Yes.
Q. What kind of a car was that?
A. I think it was a stock-car; I don't know, only what they told me.
53 Q. When you passed that car were you standing with your face towards the gondola?
A. I was standing in the stirrup and was looking down.
Q. Down the track?
A. Yes.
Q. Which hand were you holding onto the car with?
A. With my left hand—both hands; one on top and one on the bottom.
Q. With both hands?
A. Yes.
Q. So it was not until you got to the second car that something hit you, is that right?
A. Yes.

Q. What was it that hit you?
A. I don't know.
Q. Do you know whether it was the car?
A. I know it was the car, yes.
Q. How do you know that?
A. Because it grabbed me hard and broke my hold.
Q. Yes; but how do you know it was the car?
A. What else could it be? I am sure it was the car.
Q. Do you know what sort of a car it was?
A. No, I don't know just what sort of a car it was, but I know it was a car.
Q. How many cars were there on that track No. 5?
A. I don't know how many.
Q. How many would you say?
A. I couldn't say how many there was.
Q. You had been there that evening, hadn't you, through track No. 4?
A. Yes, but I didn't notice anything.
Q. You saw cars on track 5 when you went down track 4 that evening?
A. I didn't notice them, but I knew there were some cars there.
54 Q. You knew there were some cars there?
A. Yes.
Q. Then you did see some cars there when you pushed "45" out of there that night—those cars were there at that time?
A. I don't remember.
Q. You just said you knew there were some cars there?
A. No, I didn't.
Q. Did you go out with this cut of cars to Copeland?
A. No, sir; I staid in the M. C. Junction, to flag.
Q. Do you know which of the men went out to Copeland with the cut?
A. Well, the conductor and Mills and Mack.
Q. Do you know what kind of a car that was that struck you?
A. A stock car.
Q. Were there two stock cars standing on the track?
A. I couldn't say.
Q. What was the first car?
A. I couldn't say; they told me it was a stock car; I ain't sure what it was.
Q. They frequently had stock cars in that yard didn't they?
A. Oh, yes.
Q. And stock cars you could find on almost any of the tracks, wouldn't you?
A. Yes.
Q. You spoke of measuring the distance to this place where you were hurt from some switch, what switch was that?
A. From the point of the frog on No. 4 and No. 5. Between No. 4 and 5 there is a frog where No. 5 leads off from No. 4; I measured from the point of the frog down; it was 630 feet or something like that.

55 Q. How did you know it was the place where you got hurt?

A. Because I know it was; it was opposite the old elevator that was burned down and it was in the curve and I found my lantern, broken and smashed. I was not quite on the curve but right near the curve.

Q. Which way does that curve turn?

A. It ain't really a great curve, but it is just a little curve like that.

Q. Does it turn north or south?

A. About Northwest it turns.

Q. It is only a short curve?

A. It ain't a sharp curve, there is a little curve there.

Q. I understood you to say that when you were hurt you were on the straight track?

A. Well, this was just before you got to the curve.

Q. Can you give us any other description of the place you were hurt, with reference to any surrounding objects there—say the elevator?

A. Between West Broadway and Orchard street.

Q. That is a whole block; was it right across from the hotel?

— It was not directly across, but I should judge from the car-lengths from there down it must be about 12 cars, I ain't sure.

Q. You say it was 636 feet from the frog connecting track- 4 and 5?

A. Yes.

Q. Look at Exhibit No. 2, do you recognize that as a map of those yards? Where is the switch from which you measured?

A. Right there.

Q. Right where I make the letter "A"?

A. That is the frog, right there, yes.

56 Q. It was 636 feet east of that was it, that you were hurt?

A. Yes.

Q. What did you make those measurements with, a tape-line?

A. A tape-line.

Q. What kind of a tapeline?

A. A seventy-five foot one.

Q. A steel tape?

A. No, a common tape.

Q. And you used the same line, did you, measuring between the rails?

A. No, sir; between the rails we used another one.

Q. What did you use for that?

A. A tape.

Q. An ordinary tape?

A. I don't remember whether it was a steel tape or what it was.

Q. Who was with you when you made these measurements?

A. George Ernest and Schaffer.

Q. What is Earnest, what is his business?

A. I don't know.

Q. How did he happen to go with you?

A. He is a friend of mine.
Q. Who is Schaffer?
A. Well, he is Shafer.
Q. What is his business?
A. I don't know what he does; I know he is working; he went along with me; he is a friend.
Q. You don't know where he works?
A. No, sir.
Q. Who else went with you?
A. Gillsdorf.
Q. Who is he?
A. He used to be a switchman. I don't know what he is doing now.
Q. Who else?
A. Rhinefrank, or some such a name. I think he used to be a switchman.
57 Q. Did the attorneys go out with you to make the measurements?
A. Yes.
Q. You made measurements on three occasions, I think you said?
A. Yes, sir.
Q. And you found them the same all the time?
A. Yes.
Q. And the last one you made about three weeks ago?
A. About that.
Q. And they were still the same as those which you made the first time?
A. Yes.
Q. You were hurt then between the frog connecting four and five and the curve west of it, weren't you?
A. Yes; I know where I was hurt.
Q. These cuts which you had on your face, did they put any stitches in those?
A. No, sir.
Q. You had been hurt before, hadn't you?
A. Yes.
Q. A number of times?
A. About three years ago.
Q. Did you have your collar bone broken at that time?
A. No, sir, I had my clavicle crushed.
Q. When did Dr. Wright treat you?
A. He treated me about the fourth week.
Q. Dr. Wright?
A. Yes, sir.
Q. How long did he treat you?
A. Well, he could fix that date; and then I went to his office.
Q. When did you go to his office?
A. Here not long ago.
Q. Those were the only times he treated you?
A. Yes.
58 Q. Who called him to your house?
A. I did.

Q. How did you happen to call Dr. Wright?
A. Because I wanted to have a doctor make a special examination of me.
Q. What did you have that special examination for?
A. I wanted to see how bad I was injured.
Q. You had two doctors before that, hadn't you?
A. Yes.
Q. Were you thinking of bringing suit at that time?
A. No, sir.
Q. Is it not true that you told Dr. Wright to examine you in case you should bring a lawsuit?
A. No, sir, he never came to make any settlement with me, nor when I was there.
Q. Didn't you call Dr. Wright in for that purpose, four weeks after you were hurt?
A. I wanted him to say how badly I was injured.
Q. Because you were then thinking of bringing a suit against the company?
A. It would depend upon his decision.
Q. In other words, you wanted to find out from Dr. Wright whether you were badly injured enough so you could bring a suit?
A. Well, I was not thinking about it.
Q. You said just before that it would depend on his decision?
A. Yes.
Q. How many doctors did you consult before that?
A. Well, we had the company's doctor.
59 Q. Dr. Moots?
A. Yes, and Dr. Souder, those were the first two; and then McGinnis he attended me right along, and then Dr. Wright.
Q. Were you working as a regular or as a *regular* switchman at this time?
A. You will have to leave that to Mr. Flynn the yardmaster.
Q. Don't you know?
A. No, sir.
Q. Isn't it true that you were working as an extra man?
A. Well, I don't know whether I was regular then, or not; I worked regular every day.
Q. You worked as engineer and fireman for ten years?
A. Yes, sir.
Q. How often did you lay off during that time?

(Objected to; overruled; plaintiff excepted.)

A. Only when I had to. Must I tell? If so, when I was injured at different times.
Q. How many times were you injured?
A. About four.
Q. About four times—isn't it a fact that you used to frequently lay off?
A. No, sir, not unless I had to.
Q. I mean on other occasions, without an injury, in what years?
A. I forget; let's see; about 1908 I think or '7, I forget. And then another occasion was a little while after that.

Q. You say you have been injured four times all together?
A. Yes, sir.
Q. When were those four times that you were injured?
A. One was in 1908 or '7, I forget which; and then I had another little injury, I don't just remember when that was; and then
60 I was injured when I had my clavicle crushed.

Mr. NORTHUP:

Q. What year was that in?
A. 1900—what did I say that previous was? 1908? Well that is when I had my clavicle crushed, 1908, I think; I forget; it was, I don't know—I am all twisted up. I have got them all down here.

Mr. SCHMETTAU:

Q. You say it was the general custom with switchmen to ride on the side of the cars, how do you know that?
A. Because I see them doing it all the time.
Q. Did you see them while you were working there as engineer and fireman?
A. Yes.
Q. All those years?
A. Yes.
Q. Have you seen them doing that on those tracks?
A. Yes; right on them there.
Q. Did they do it on those tracks as much as the others?
A. Well, I rode on those tracks there.
Q. You had seen them ride on those tracks when you were running the engine?
A. I don't remember.
Q. How do you know it was the custom to ride on those tracks, on the side?
A. It is the custom for switchmen to ride where they can give the engineer signals.
Q. How do you know it was the custom of switchmen to ride on those tracks on the side of the cars?
A. In order to give signals to the engineer.
Q. Do you mean to say to the jury that at the time you worked there you had ever seen men ride on the sides of the cars
61-68 on tracks four and five?
A. I didn't say that. I had seen them.
Q. You had seen cars on those tracks while they rode?
A. Yes.
Q. Did you ever see any of them hit by the cars as they were riding on them?
A. No.
Q. You never knew of a man to be hit, did you, between those tracks?
A. I had heard of it.
Q. You had heard of men being hit by cars while riding?
A. I heard of them having their clothes torn.
Q. When did you hear that?

A. I heard it once when I was in bed with my injuries.
Q. When did you hear it before that—when did you first hear of those things?
A. I didn't hear of it before, those things I never paid any attention to.
Q. You had never seen anybody hit by a car there, did you?
A. No, sir.

Re-examination.

Mr. MASTERS:

Q. Which shoulder was it—speaking about having your clavicle broken?
A. That was the left shoulder.
Q. You have been injured three or four times?
A. Yes.
Q. Working for the same company?
A. Yes.
Q. And this is the first time you have ever sued the company?
(Objected to.)
A. Yes.
The COURT: The answer will be disregarded.

* * * * * * *

69 Plaintiff further to maintain the issues on his part called as a witness CHESTER MACK who first being duly sworn testified as follows:

70–77 Direct examination.

By Mr. MASTERS:

Q. You may tell your name?
A. Chester Mack.
Q. Where do you live?
A. 2059 South Avenue.
Q. What is your business?
A. Switchman.
Q. For what company?
A. The Toledo, St. Louis & Western.
Q. Are you now in the employ of the Toledo, St. Louis & Western?
A. Yes, sir.
Q. How long have you been employed by that company?
A. Nine months.
Q. How, as switchman?
A. Yes, sir.

* * * * * * *

78–79 Q. When you used to bring those cars in from Copeland with the "bum" engine did you often run in onto track No. 4?
A. It was the custom to pull them in there every night.

Q. Had you done that for the seven days that Slavin worked with you?

A. Every night that we shoved "45" out we came back into No. 4.

Q. —onto that track?

A. Yes, sir.

80 Plaintiff further to maintain the issues on his part called as a witness

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81 JAMES SPANGLER who being first duly sworn testified as follows:

Direct examination.

By Mr. MASTERS:

Q. Where do you live?

A. 824 Colburn Street.

Q. On last August and prior thereto, what was your employment?

A. I was a switchman for the Clover Leaf.

Q. In the yards here in Toledo?

A. Yes, sir.

* * * * * * *

82 Cross-examination.

By Mr. SCHMETTAU:

Q. How long have you worked in those yards?

A. I worked there nine months the last time; not quite nine months, eight months and a few days.

Q. When did you start to work there?

A. I started to work there last June, this last time.

Q. That is, June, 1910?

A. 1910, yes, sir.

Q. When did you quit?

A. I quit February 10, that is last February.

Q. From the time you started to the time you left, those tracks were all in the same shape?

A. I have not seen any change, no.

Q. And you knew that tracks 4 and 5 were close together?

A. I knew they was, yes.

Q. You found that out when you got there?

A. Yes, sir.

83–97 Q. That was quite apparent when there were cars standing on that track or those two tracks, was it not—easy to see that they were close together?

A. Oh, you could see all right if your light didn't go out; I always managed to see that fault.

Q. When there were cars standing on those two tracks, it was quite easy to see that there was not much room between them?

A. Yes.

Q. It appeared to you that those tracks were closer together than any other tracks in the yard?
A. Yes, sir.

* * * * * * *

98–100 Plaintiff further to maintain the issues on his part called as a witness, E. M. SKIVER, who first being duly sworn, testified as follows:

Direct examination.

By Mr. MASTERS:

Q. Are you a brother to Charles E. Skiver?
A. Yes, sir.
Q. Where do you live?
A. 2237 Broadway.
Q. What is your occupation?
A. Yard conductor.
Q. You are a switchman?
A. Yes, sir.
Q. What was your occupation last August and prior thereto?
A. Conductor, yard conductor or switchman.
Q. For what company?
A. The Toledo, St. Louis & Western.
Q. Were you acquainted with the yards here in South Street?
A. Yes, sir.

* * * * * * *

101 Cross-examination.

By Mr. SCHMETTAU:

Q. How long have you worked up there?
A. Four years the 8th day of next month.
Q. You are still working there, aren't you?
A. Yes, sir.
Q. During the whole time that you were there, tracks No. 4 and No. 5 were in that same location?
A. Yes, sir.
Q. No change has been made?
A. No change, except raising up a little, probably.
Q. Grading?
A. Yes, sir.
Q. But no difference in the distances between them?
A. No, sir.
Q. During all of those four years do you remember of Mr. Slavin working there?
A. Yes.
Q. Did you ever work with him?
A. Yes, sir.
Q. What work was he doing when you worked with him?
A. Engineer.
Q. What were you doing?

A. Well, I have helped other conductors and I had charge of the engine with him.

Q. During all that time did you work in those yards in the neighborhood of these tracks No. 4 and No. 5?

A Yes, sir.

Q. Worked there with him when there were cars on those tracks?

A. Yes, sir.

Q. In the daytime?

A. Yes, sir.

102 Q. At those tracks and they were in exactly the same location, were they?

A. Yes, sir.

Q. Just as close together?

A. Yes, sir.

Q. With just as little room between the cars?

A. Yes, sir.

Q. You had known Slavin then to have worked there for about four years under those conditions?

A. Yes, sir.

* * * * * * * * *

103 Plaintiff further to maintain the issues on his part called as a witness, FRANK PENNY, who first being duly sworn, testified as follows:

Direct examination.

By Mr. MASTERS:

Q. Where do you live?

A. 1937 Broadway.

Q. What is your occupation?

A. Switchman.

104 & 105 Q. What company are you employed with?

A. The Clover Leaf, or the Toledo, St. Louis & Western.

Q. How long have you been in the employ of that company?

A. 19 months the 16th of this month.

Q. Are you a switchman in the yards down there?

A. Yes, sir.

Q. On the 19th of August last were you a switchman there?

A. Yes, sir.

* * * * * * *

106 Cross-examination.

By Mr. SCHMETTAU:

Q. How long were you working in those yards?

A. Nineteen months.

Q. You were there when Slavin was working as engineer and fireman?

A. Yes, sir.

Q. Did you ever work with him on the same engine?

A. Yes, sir.
Q. At those times, what did he do?
A. That engine is an extra engine, known as a Bum engine.
Q. You worked on the Bum engine as a switchman?
A. Yes.
107 Q. When Slavin was running it?
A. Yes, sir.
Q. During that time that engine was shoving "45" out every night and taking it to Copeland and picking up cars at Copeland and coming back on track 4?
A. Yes, sir.
Q. That is the track you all came back on, was it?
A. Yes, sir.
Q. And the cars were brought in to be left on that track?
A. Yes, sir.
Q. During all this time those tracks were just as close together?
A. Yes, sir.
Q. And during all this time they were so close that there would only be about six inches space between the cars?
A. They would vary; some cars were closer than others.
Q. In all this time there would be times when there would be only six inches between them?
A. Yes, sir.

Plaintiff further to maintain the issues on his part called as a witness WILLIAM S. TEAL, who first being duly sworn, testified as follows:

Direct examination.

By Mr. MASTERS:

Q. Will you tell the jury your name?
A. William Teal.
Q. Where do you live?
A. 832 Barnes.
Q. What is your business?
A. I am in the car department, foreman.
Q. For what company?
A. The Detroit & Toledo Shore Line.
108–110 Q. When were you employed by the Clover Leaf, if ever?
A. I left the service of the Clover Leaf November 14th.
Q. What was your business when you were in the employ of the Clover Leaf?
A. Inspector.
Q. When?
A. In August last year, I was car inspector.

* * * * * * *

111 Cross-examination.

By Mr. SCHMETTAU:

Q. When was it that you made those measurements?
A. That was a week or two afterwards.
Q. It must have been a week or two?
A. I think it was on my next shift day.
Q. At that time were those cars which were on tracks 4 and 5 that night, still in the yard?
A. No, sir.
Q. How many cars did that engine bring in on track 4?
A. I couldn't say just exactly, but I took the number of cars from the engine where I found him.
Q. Did you make a memorandum of those numbers?
A. Yes.
Q. Is that the memorandum which you made of those cars?
A. Yes.
Q. Give the jury the numbers of the cars and the roads they belonged to?
A. On track 4, Hocking Valley, No. 24065; Hocking Valley, 24061; Hocking Valley, 592; Hocking Valley, 16050; Hocking Valley, 17177; Hocking Valley, 62077, Hocking Valley, 24588; Hocking Valley, 6516; Hocking Valley, 25213; Hocking Valley, 14646; Hocking Valley, 24128; that is all on track 4. Now on track 5 where I found Mr. Slavin, was Missouri Pacific 50705, that was a stock car.
Q. Do I understand that these were all the cars on track 4 from the engine to where this man was lying?
A. Yes.
Q. Were they still connected with the engine?
A. The engine hadn't cut off; I couldn't exactly say whether they had cut off, but the engine stood right there. These were cars that the engine brought in from Copeland.
112–119 Q. Were the cars empty or loaded?
A. They were loaded.

The COURT:

Q. Was there only one car on track 5?
A. That is, to where we found him, I just took it up to that track. There were more cars ahead, of course.
Q. What was the first car?
A. If I am not mistaken, I think there was a car ahead of it, I wouldn't positively say. Of course we make an inspection of all cars.
The COURT: That is all.

Mr. SCHMETTAU:

Q. Was there any car ahead of this Missouri Pacific car?
A. I am pretty sure there was, yes.
Q. On track 5?
A. Yes, sir.

Mr. MASTERS:

Q. What company owned or controlled those yards?

(Objected to; overruled; defendant excepted.)

A. The Toledo, St. Louis & Western.

* * * * * * *

120 Plaintiff, further to maintain the issues on his part, called as a witness, ELWOOD SQUIRES, who, first being duly sworn testified as follows:

Direct examination.

By Mr. MASTERS:

Q. What is your business?
A. Conductor, pony conductor in the yards.
Q. For what company?
A. The Toledo, St. Louis & Western.
Q. How long have you been in their employ?
A. About nine years.
Q. What is your street address?
A. 1106 — Place.
Q. Last August, 1910, were you in the employ of the same company?
A. Yes, sir.
Q. As conductor?
A. Yes, sir.
Q. Your office as conductor required you to be around the yards on South Street?
A. Yes.

* * * * * * *

121 Cross-examination.

By Mr. SCHMETTAU:

Q. How long have you worked there?
A. I have been there about nine years.
Q. Those tracks have been in the same location all the time, have they?
A. Yes, sir.

122 Q. And the tracks four and five and five and six and six and seven—they are all about the same distance apart?
A. Just exactly the same.
Q. Were you there when Slavin worked in the yards?
A. Yes, sir.
Q. While he worked there as engineer and fireman?
A. Yes, sir.
Q. Did you work with him?
A. Yes, sir.
Q. On these tracks four and five?
A. Yes, sir.
Q. Did you take cars in and out of these tracks?

A. Yes, sir.

Q. While there were cars standing on the other tracks next to them?

A. Certainly.

Q. How long have you known Slavin to work there under those same conditions?

A. Well, Slavin was working there when I went to work for the company; I believe he was firing there, if I am not mistaken, he was firing there when I went to work for the company.

* * * * * * *

123–133 Thereupon the plaintiff rested his case in chief.

Defendant's Testimony.

* * * * * * *

134 Defendant further to maintain the issues on its part called
135 as a witness A. W. SHEAHEN, who, first being duly sworn, testified as follows:

Direct examination.

By Mr. SCHMETTAU:

Q. Where do you live?

A. 2555 Hollywood Avenue.

Q. You are the agent of the Toledo, St. Louis & Western Railroad Company at Toledo?

A. Yes.

Q. And you were agent in August 1910 at the time Mr. Slavin was injured?

A. Yes, sir.

Q. I show you this paper, Exhibit No. 3, and call your attention to the car numbers shown on that paper; will you state to the jury, if you are able to, what those cars were and where they were billed to, if you have any memorandum? (Witness here produced a paper.) These are the cars which the talley covered; state where they were billed to when they were in the yards at the time Mr. Slavin was injured? I want all those on this list?

A. The first car was a Hocking Valley No. 24065; the original point of shipment was Dickinson, West Virginia; destination, Bluffton, Indiana; No. 62077 T. & W. from Deep Water, West Virginia, for Delphos, Ohio; No. 24061, Hocking Valley, from South Columbus, Ohio, for Granite City, Illinois; No. 5921, the same all around; 16050, Hocking Valley, from Nelsonville, Ohio, for Kokomo, Indiana; No. 17177, Hocking Valley, from Pomeroy, Ohio, for Maumee, Ohio; No. 6516, Hocking Valley, from Nelsonville, Ohio, to Delphos, Ohio; No. 25053, Hocking Valley, from Nelsonville, to Delphos, Ohio; No. 24588, Hocking Valley,
136 from Dickinson, West Virginia, for Wingate, Indiana; No. 25213, Hocking Valley, from South Columbus, Ohio, for Granite City, Illinois; that is all.

Q. Now you may tell the jury whether or not those cars were forwarded to the destinations which you have given?

A. These cars all were forwarded to the destinations as billed, to the railroad points.

Q. Those cars which were in the yards of the company, were they loaded, or empty?

A. All loaded cars.

Q. I wish you would tell the jury how those car numbers and their destinations are taken?

A. The cars arrive in the yard and the yard clerk gets a list of the car numbers and he has information on hand in the yard office showing the car numbers and destination of all loaded cars and how they are marked up.

Q. What if any report does the yard clerk file in your office?

A. He makes a daily train list of all cars received.

Q. I show you this paper marked Exhibit No. 4, what is that?

A. Train sheet.

Q. By whom was it made out?

A. By the yard clerk, Mr. Connell.

Q. Is he now in the employ of the company?

A. No, sir.

Q. Do you recognize the handwriting of that sheet?

A. Yes, sir.

Q. State whether or not that was made by Connell in pursuance of his duties in that respect?

A. Yes, sir.

Q. What was done with it after he made it?

A. Sent to our office.

Q. I notice in this sheet a column headed by the word "to,"
137 and the name of a city appearing under the word "to," what does that indicate?

A. The destination that the shipment is billed to.

Q. Where are Bluffton and Kokomo?

A. In the state of Indiana.

Q. And where is Granite City?

A. In the State of Illinois.

Q. And East St. Louis?

A. In Illinois.

Q. In August, 1910, what were the termini of the Clover Leaf Railroad?

A. East St. Louis.

Q. And what other terminus?

A. Toledo.

Q. Through what states does this road run?

A. Ohio, Indiana and Illinois.

Q. What business did the road do at that time, was it doing, with reference to the transportation of freight to different points in these different states?

A. It was acting as a common carrier.

Q. Between what points was it transporting goods?

A. Between points in Indiana, Ohio and Illinois.

Q. How about goods destined from points in this state to points in other states?

A. Yes, that is what we term "interstate traffic."

Q. Was the road doing that kind of business in August, 1910?

A. Yes, sir.

Q. I notice on this train-sheet, Exhibit No. 4 the date "8/19," to what date does that refer?

A. August 19th, 1910.

Q. "Engine No. 10" what engine was that?

A. Yard engine of the Toledo, St. Louis & Western.

Q. Was that what is known as the Bum engine?

A. Yes, sir.

138 Q. State whether or not you know what salary Mr. Slavin was drawing at the time he was hurt?

A. I could not answer that.

Q. These cars that you have spoken of that went to the different destinations you have mentioned, from what road were they received by the Clover Leaf?

A. They were received from the Hocking Valley by The Toledo Terminal Railroad at Copeland, Ohio.

Q. What was done with them then?

A. They were brought in from Copeland, Ohio, to the M. C. Junction where they were switched and put into trains going west to their destination.

Q. State whether or not they remained under the same load from the time they were received from the Hocking Valley?

A. The same cars went through.

Cross-examination.

By Mr. NORTHUP:

Q. Do you know where Mr. Slavin was working on the night of August 19?

A. No, sir.

Q. You don't know what engine brought in the cars from Copeland?

A. Only from my records.

Q. The train that brought in from Copeland—it is brought in by some Clover Leaf engine?

A. The Clover Leaf yard engine, yes.

Q. And the train was under control of the railroad while it was brought in?

A. Yes.

Q. And all of those cars were under control of the Clover Leaf while they were in its yard?

A. Yes, sir.

139 Q. That was true of all the cars the numbers of which you have given here?

A. Yes, sir.

Q. This yard of which you speak is the Clover Leaf yard?

A. Yes, sir.

Q. It is exclusively under the control of the Clover Leaf?
A. Yes, sir.
Q. The Hocking Valley and the rest of the roads have nothing to do with it?
A. No, sir.
Q. You have referred to a paper there from which you read the numbers of these cars, where did you get that paper?
A. I made it, from the records in our office.
Q. Who made up those records from which you made this copy?
A. Well, there were various clerks in our office.
Q. Were you present when those records were made?
A. Yes, I was around the building.
Q. Do you know of your own knowledge that those records are correct?
A. From the handwriting.
Q. Do you know of your own knowledge that the record is correct?
A. Only as to the way I got it from the records; I didn't handle them personally.
Q. You never inspected those cars?
A. No, sir.
Q. You don't know whether the person who took the numbers off the car and reported them to you, reported the numbers correctly, or not, do you?
A. By checking them with the bill and verifying the records of the yard clerk, I have checked them.
Q. You will have to assume that there was no error made by either of the persons reporting to you before you could know that they were correct?
A. Yes, sir.
140–166 Q. All you know about the numbers of these cars is what people have told you?
A. Through the way-bill, in writing, yes.

Mr. SCHMETTAU:

Q. State to the jury exactly how the bill forwarding these cars is handled or done?
A. Three of the cars that we received from the Hocking Valley were delivered to us covered by what we term transfers and they were re-billed in our office.
Q. Have you the original re-billing with you?
A. Yes, sir.

Mr. NORTHUP:

Q. You refer to a gentleman named Conwell, what is his first name?
A. Charles.
Q. Where did you last see him?
A. I saw him sitting over here in the court room.
Q. And he is sitting in the court room now?
A. Yes, sir.

Mr. SCHMETTAU: We offer in evidence Exhibits No. 3 and 4. (Objected to as immaterial.)

The COURT: I will reserve the ruling on them until the close of the evidence.

* * * * * * *

167 Thereupon the defendant rested.

Plaintiff offered no rebutting evidence, and rested.

Mr. SCHMETTAU: At this point the defendant moves the court to instruct the jury that under the pleadings and the evidence in this case, their verdict must be for the defendant.

(Jury retired during argument of said motion, after the arguments thereon the court denied and overruled said motion, to which the defendant duly excepted.)

The foregoing together with the several exhibits hereto attached and made a part hereof, is all the evidence and testimony given, offered or submitted by either party on said trial of said case at said time and term.

Thereupon the plaintiff by his counsel requested the court, in writing and before arguments to the jury, to give to the jury in charge the following propositions of law, to-wit:

1. If you find that at and before the time the plaintiff was injured the railroad tracks, known as Number Four and Number
168 Five referred to in the pleadings in this case, were substantially in the condition with respect to the distance between them that plaintiff in his petition claims them to be, and that plaintiff knew these facts before he was injured, then I charge you that as a matter of law the plaintiff did not thereby assume the risk of injury from the proximity of said tracks.

And the defendant, by its counsel, requested the court, in writing to give to the jury in his charge the following propositions of law, to-wit:

1. You are instructed that as the uncontradicted evidence in this case shows that the defendant at the time the plaintiff received his injuries was a common carrier engaged in interstate commerce between the several states and that the plaintiff at the time he received his injuries was employed by the defendant in such commerce, the relations between the plaintiff and defendant were exclusively governed by the Act of Congress approved April 22, 1908, and entitled "An Act relating to the Liability of Common Carriers by Railroads to their Employés in certain Cases."

That act, so far as applicable to the case at bar, provides as follows:

"That every common carrier by railroad while engaging in commerce between any of the several States or Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, or other equipment."

169 "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employé, * * * the fact that the employé may have been guilty of contributory negligence shall not be a bar to recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé; * * *"

* * * * * * *

3. You are instructed that the Act of Congress approved April 22, 1908, and entitled "An Act Relating to the Liability of Common Carriers by railroads to their Employés in certain Cases," and under which the plaintiff must recover, if he recover at all, does not bar the defense that the plaintiff assumed the risk of the matters and things in regard to which in his petition herein he alleges that the defendant was negligent. If, therefore, you find from the evidence that at the time of his injury the plaintiff knew, or in the exercise of reasonable care could have known, that tracks 4 and 5 were so close together that in riding upon the south side of a car moving on track 4, he could not safely pass cars standing upon track 5, and that there were or were likely to be cars standing upon track 5 at the time he was riding on the side of said car on track 4, then you
170 & 171 are instructed that the plaintiff is not entitled to recover and your verdict herein must be for the defendant.

* * * * * * *

172 10. If you find from the evidence that the plaintiff Slavin had worked in the defendant's yards, where he was injured, for about ten years prior to the date on which he was injured; that during the entire time he had so worked in said yards tracks 4 and 5 were as close together as they were at the time when the plaintiff was injured, and that cars frequently stood upon both of said tracks, and that the fact that said tracks were so close together that there was not room for a switchman hanging to the side of a car moving on one of said tracks to safely pass cars standing upon the other of said tracks, was obvious and apparent to any person working in said yards and using ordinary care in observing his surroundings, then you are instructed that the plaintiff Slavin must be deemed conclusively to have known of the location of the said tracks with reference to each other and of the lack of space between them and of the dangers incident thereto.

11. If you find from the evidence that by reason of his long service in defendant's yard the plaintiff's opportunities and means of knowing that there was not sufficient space between track 4 and 5 to enable a switchman to safely ride on the south side of a
173 car moving on track 4, without striking cars standing upon track 5, were as good as those of the defendant, then you are instructed that plaintiff assumed the risks growing out of the lack of space between said tracks, even though you may further find from the evidence that he had no actual knowledge of the lack of space between said tracks.

12. If you find from the evidence that by reason of his long serv-

ice in defendant's yards, the plaintiff's opportunities and means of knowledge that there was not sufficient space between tracks 4 and 5 in said yards to enable a switchman to safely ride on the south side of a car moving on track 4 without danger of striking cars standing on track 5, were as good as those of the defendant, then you are instructed that the plaintiff must, as a matter of law, be charged with knowledge of the lack of space between tracks 4 and 5 and the dangers resulting therefrom, even though you may further find from the evidence that the plaintiff had no actual knowledge of the lack of space between the said tracks and the dangers resulting therefrom.

13. You are instructed that the plaintiff Slavin on entering the defendant's employment as a switchman, assumed the risk of the ordinary dangers of that employment, and also the risks of the employment arising out of the manner in which the tracks in the yards where he was employed to work were constructed and located, if he knew or in the exercise of ordinary care could have observed and known the manner in which said tracks were located and constructed and the dangers arising therefrom. And it is not necessary that the plaintiff should have acquired such knowledge or had such means of knowledge during the time he was employed in said yards as switchman, but if you find from the evidence that the plaintiff whilst he worked in such yards as engineer or fireman knew, or in the exercise of ordinary care should have known the manner in which the tracks therein were located and constructed and the dangers arising therefrom to switchmen in the performance of their work, he assumed all the risks growing out of the manner in which said tracks were constructed and located when he afterwards entered defendant's employ as a switchman.

174 & 175

14. If you find from the evidence that Slavin knew, or in the exercise of ordinary care should have known, that there was not sufficient space between tracks 4 and 5 to enable him to ride on the south side of a car moving on track 4 without danger of striking cars standing on track 5, then you are instructed that your verdict herein must be for the defendant.

15. The plaintiff Slavin was as a matter of law presumed to be aware of and to take notice of all risks and dangers which were open to observation, and it was his duty to exercise his senses and use reasonable care under the circumstances to examine his surroundings, and if in the exercise of such care the plaintiff knew or could have known of the conditions and circumstances under which the work was done on tracks 4 and 5 and the dangers incident thereto owing to the closeness of said tracks to each other, then he must be held to have assumed the risks thereby occasioned.

* * * * * * *

176 Thereupon the court charged the jury as follows:

Charge of the Court.

Gentemen of the Jury:

The plaintiff, Otto E. Slavin, has brought this action against The Toledo, St. Louis & Western Railroad Company and as his cause of action for which he seeks to recover damages from de-
177 defendant claims, and defendant admits, that it is a railroad corporation operated in this state and county, and was such on the 19th day of August, 1910; the plaintiff claims and it is admitted that on the 19th day of August of said year he was in the employ of defendant as a switchman and that he had been in its employ as switchman for the period of six days. The plaintiff claims that in the City of Toledo the defendant maintained tracks in its yard among which were tracks known as the fourth and fifth tracks, and that the westerly rail of the fifth track was but six feet distant from the easterly rail of the fourth track, so-called. The plaintiff claims that upon the 19th day of August, 1910, about nine o'clock, and while it was dark, he was engaged in the performance of his duty as a switchman. He states that he was riding at that time upon the outside of a gondola car which was being moved in a northerly direction upon the fourth track of the defendant. He states that when this gondola car had arrived at a point on the fourth track about midway between West Broadway, if extended westerly and Orchard Street, if extended westerly across said tracks, that the plaintiff was then violently struck by and collided with another freight car standing on the fifth track. This collision, he says, caused him to lose his hold; he fell upon the ground and suffered injuries. The plaintiff says that at that time, that is, at the time of the injury, he did not know of the presence of any car upon the fifth track until he was within a car length of the car with which he came into collision, and he states that he had not then sufficient time or opportunity to move himself from his position on said gondola car to a place of safety. The plaintiff states that it
178 was customary for switchmen to ride upon the sides of cars and that this custom had existed for many years and was well known to the defendant, but he says that at the time of his injury and for more than a year previous the defendant had permitted its tracks four and five to remain in close proximity to each other and had negligently permitted the use of the fourth and fifth tracks for the transportation and locating of cars and had negligently placed cars of such width on said fifth track and allowed them to remain there during the time that defendant was using the fourth track. He says that the defendant negligently failed and omitted to notify plaintiff of the presence of cars upon the fifth track. He also alleges that the distance between the gondola car upon which he was riding and the car with which he collided was about eleven inches. By reason of this contact, plaintiff states that he has received painful, severe and permanent injuries; that two of his right ribs were broken; his right shoulder and the ligaments thereof torn, his right

arm cut, also the bridge of his nose and his cheek were cut and that there were other injuries, the nature of which he states in his petition he was not at the time of filing his petition able to state.

Mr. NORTHUP: The last clause was stricken out, on motion.

The COURT: The jury will disregard that claim. As a consequence, he says, of his internal injuries, he is compelled to expectorate blood; that he suffers great pains and that his nervous system has been greatly injured, his ability to sleep impaired;
179 that he has incurred expense in attempting to be cured of said injuries and will hereafter incur indebtedness for further efforts to be cured. All of these things the plaintiff claims have caused him damage in the sum of fifteen thousand dollars, for which sum he asks judgment.

The defendant, while admitting, as before stated, that the plaintiff was in its employ as a switchman, denies that it was guilty of negligence as alleged or of any negligence whatsoever causing or contributing to plaintiff's alleged injuries; denies also that the plaintiff himself was without fault and generally denies every allegation which is not admitted. In addition the defendant also alleges that the plaintiff was guilty of negligence which caused or directly contributed to his injuries as claimed by him, in several respects. The defendant claims that the plaintiff knew the location of said four and five numbered tracks in defendant's yards and the distance between them and that plaintiff knew at the time of the occurrences in the petition described that certain cars were standing upon the fifth track, and yet, the defendant says, with this knowledge the plaintiff unnecessarily placed himself outside of a car moving upon track four in such a position that the plaintiff was struck by one of the cars standing upon track five. The defendant also says that knowing the location of these tracks and the distance between them and the presence of cars upon track five, the plaintiff, while in a dangerous position upon a moving car upon the fourth track, where he had voluntarily placed himself, as the defendant says, failed to exercise reasonable care in observing his surroundings and the defendant says, that by reason of this, the plaintiff was struck by a
180 car standing on track number five. Moreover, the defendant alleges, that with the knowledge that plaintiff had, as the defendant says, of the location of the tracks and of the distances between them and of the presence of cars upon track five, the plaintiff, although not required in the performance of his duties nor in the performance of the work assigned him, yet voluntarily placed himself in a dangerous position upon the moving car upon track four and thus was struck. The defendant also alleges that there were other matters of contributory negligence; but I say to you as a matter of law, gentlemen of the jury, that the matters alleged are the only matters concerning which evidence here appears.

Mr. WILLIAMS: That was stricken out.

The COURT: Well, the instruction covers it.

The plaintiff has replied to the claims made by the defendant and denies every allegation of contributory negligence or of negligence on the part of the plaintiff.

These claims thus made concerning the facts, by these parties, constitute the issues of fact which it is for you to determine according to the rules of law controlling such cases. With respect to the matters which are set forth in the petition, the burden is upon the plaintiff to show by a preponderance of the evidence all of the material facts which are claimed by him as constituting his cause of action and which are denied by the defendant. The gist of this action is negligence, which the plaintiff claims and which the defendant denies. Your first inquiry then will relate to the
181 determination of this question: Was the defendant negligent?

If the defendant was not negligent then there is no occasion for further deliberation on your part, no matter what the evidence may show with respect to other matters. The plaintiff's claim of negligence relates to the matters which you may consider, under the evidence in this case, of negligence on the part of the defendant. That negligence claimed by the plaintiff as causing the injury is the location of tracks four and five and the placing of cars thereon of such width and allowing them to remain there so as to leave a place which was not sufficient for plaintiff safely to ride in the position in which his duties required him to ride, at the time he was injured. I say to you, gentlemen of the jury, that the mere construction of the tracks, without anything else, was not negligence. By that you may understand that the defendant had a perfect right to lay tracks as closely as it saw fit in the yards for its own purposes. The negligence claimed is not alone in the laying of the tracks, but that the tracks being laid, as plaintiff claims, thus close together, the defendant recklessly caused them to be used in such manner as brought about his injury, because plaintiff says defendant negligently placed and located a car of such width as left an insufficient space for the safe performance of the plaintiff's duty. Your first inquiry, then, will pertain to that subject. Was the situation as it then existed by the location of cars on track five, as plaintiff was moving with cars on track four, negligence? If that was negligence, then you may find the defendant to have been negligent. If, however, under the circumstances as they then existed it was
182 ordinary care to place a car of the width of the car which was then standing upon track five at the time and place when plaintiff was in the performance of his duty upon cars moving along upon track four, then the defendant is not guilty of negligence; and if the defendant was not guilty of negligence, the plaintiff cannot recover in this action. The burden of proof is upon the plaintiff upon this matter of negligence to show by a preponderance of the evidence that the defendant was then negligent as claimed. The plaintiff claims that it was the duty of the defendant to notify him; and that defendant was negligent in failing to notify him of the placing of the car upon track five. You may consider under all of the evidence whether it was the duty of the defendant in the exercise of ordinary care to notify its switchmen operating the cars upon which plaintiff was working, of the location of the car upon track five while plaintiff was engaged upon track four in the manner shown by the evidence as you shall find it. If it was the duty in

the exercise of ordinary care, of the defendant thus to notify the plaintiff and the defendant failed to notify—because there is no evidence that the defendant did notify—then you must find the fact of negligence, otherwise the defendant was not negligent. If you find then that defendant was not negligent, you need proceed no further; but if you find that defendant was negligent, it is your duty to inquire whether or not the negligence of defendant was the proximate cause of the injuries which plaintiff sustained.

A "proximate cause" is a cause which in the natural and continu-
ance sequence of events, unbroken by any efficient interven-
183 ing cause, produces the result complained of. The proxi-
mate cause is the cause from which a result naturally flows. You will inquire, then, whether it was the natural result of defendant's negligence, as claimed by the plaintiff, which caused plaintiff's injuries. If there were any other cause intervening through the conduct of the plaintiff or otherwise, which was the proximate cause, then the defendant's negligence is not negligence for which the plaintiff may recover—he may recover only for such negligence as proximately caused his injuries. If the negligence of the defendant proximately caused the injury of the plaintiff, you may then inquire whether or not the plaintiff himself was negligent. In regard to the plaintiff's negligence, gentlemen, you will consider that if the evidence offered by the plaintiff himself raises a presumption that the plaintiff himself was not in the exercise of ordinary care under the circumstances as they existed, considering his knowledge of the circumstances and situation, then the plaintiff himself was guilty of negligence. If his own evidence raises this presumption, then it is the duty of the plaintiff by evidence which he shall produce and bring before you to remove that presumption by other evidence, otherwise the plaintiff may not recover. If the presumption once raised is not removed, no matter what the negligence of defendant, yet the plaintiff may not recover if his own evidence raises a presumption of negligence. But if from an examination of the plaintiff's own evidence no such presumption arises, then it is the duty of the defendant and the burden is upon the defendant to show by a preponderance of the evidence that the plaintiff was
negligent. The negligence of the plaintiff in like manner
184 with the negligence of defendant, must be such negligence as
proximately caused or contributed to his injury.

In determining in the care or want of care of the plaintiff, it is your duty to consider all of the circumstances surrounding the parties at the time; to consider their means of knowledge, their experience and opportunity of knowing the conditions as they existed. The legislature has regulated by recent acts this branch of the law so that an employé of a railroad company who is injured as the result of a defect shall not be deemed to have assumed the risk in connection therewith, although continuing in the employ of the company after knowledge of the defect. The distance between the tracks, the location of tracks four and five, if those tracks were at such a distance apart as was not sufficient to enable the plaintiff safely to perform his duties, was a defect within the meaning of this act. A

defect means a blemish or imperfection. The yard- of the defendant and the tracks laid in the yards are to be considered together as one structure and you will therefore consider that the plaintiff did not assume the risk arising from the performance of his duty on these tracks, if properly done, if these tracks were so close together as to constitute a danger. The location of cars upon those tracks and the customary and usual course of business in relation to the cars; the customary and usual course of business with regard to notifying employés of the location, you will consider also in that connection but with this difference—that if it was not a custom to notify employés of the location of cars and the defendant customarily failed to notify switchmen moving upon tracks four and five of a
185 car standing on track number five, or of the fact that a car stood upon track five, then the plaintiff assumed the risk arising from the failure on the part of defendant to notify.

That is to say, if the plaintiff knew and understood that he would not be notified in the ordinary course of business and that it was not the custom to notify switchmen of cars upon track five when they were about to move cars upon and along track four, then the plaintiff assumed the risk of failing to receive notification. If the plaintiff at the time, on August 19th, 1910, knew, or should have known, of the placing of this car upon track five as he was moving along track four, and with this knowledge, failed carelessly to place himself out of danger which he then knew and understood, that would constitute negligence upon the part of the plaintiff.

In that connection, gentlemen, I am requested by defendant to give you a number of instructions and to them I will now call your attention, as constituting part of the law in this case.

You are instructed that proof that tracks 4 and 5 in defendant's yards were so close together that switchmen could not safely work in between them, or could not safely ride upon the side of cars moving on said tracks, or either of them, is not alone and of itself proof that the defendant was negligent in constructing its tracks so close together.

Whilst the defendant was bound to exercise reasonable care in providing Slavin with a reasonably safe place in which to perform his duties as a switchmen, yet Slavin was equally bound to exer-
186 cise reasonable care for his own safety. In the exercise of the degree of care which the law required of him, he was bound to take notice of all risks and dangers which were open to his observation in the reasonably careful exercise of his senses, and if he failed to do so he was guilty of contributory negligence.

If you find from the evidence that Slavin, by reason of his long employment in defendant's yards at Toledo, knew, or in the exercise of reasonable care should have known, that tracks 4 and 5 were so close together that he could not, whilst riding on the south side of a car moving on track 4, safely pass a car standing on track 5 and that with such knowledge he voluntarily rode on the south side of a car moving on track 4 when he knew or in the exercise of reasonable care should have known that there were cars standing on track 5,

which he would have to pass, then you are instructed that in so doing Slavin was guilty of contributory negligence.

If you find from the evidence that Slavin was not exercising reasonable care for his safety in riding upon the side of a car on track 4 at the time he was injured, then you are instructed that he was guilty of contributory negligence, even though you may find from the evidence that other switchmen in the defendant's yards were in the habit of riding in the same position and at the same place on cars moving on track 4 or upon other tracks in said yards.

You are instructed that even if you find from the evidence that it was the custom of switchmen in the defendant's yards at
187 Toledo to ride on the side of cars at the place on the car and in the manner in which plaintiff was riding on the gondola car at the time he was injured, yet if you further find that in view of the manner in which said yards were constructed and the lack of space between the tracks therein the practice of so riding on the side of cars was dangerous and not compatible with reasonable care on the part of such switchmen, then you are instructed that in so riding on the side of the car Slavin was guilty of contributory negligence, even though it may have been customary for other switchmen to do the same thing.

If you find from the evidence that by reason of his long employment in defendant's yards at Toledo, Slavin knew, or in the exercise of reasonable care could have known, that tracks 4 and 5 were so close together that he could not whilst riding on the south side of a car moving on track 4, safely pass a car standing on track 5, then, although under the statutes of Ohio governing this act, the fact that Slavin continued in defendant's employment with such knowledge cannot be deemed an act of contributory negligence on his part, yet the fact that with such knowledge he did attempt to ride on the south side of a car moving on track 4 will constitute contributory negligence on his part, of you find from the evidence that an ordinarily careful and prudent switchman having such knowledge would not have so acted.

You are instructed that if you find from the evidence that the plaintiff was guilty of contributory negligence, your verdict must be for the defendant, unless you further find that the plaintiff's negligence was slight and that of the defendant greater in comparison.

188 You are instructed that if you find from the evidence that both the defendant and the plaintiff were guilty of negligence and the negligence of the plaintiff was equally as great as that of the defendant, your verdict must be for the defendant."

You see from these instructions, gentlemen, that customary negligence either of the plaintiff or of the defendant, is no defense. Both were required, at the time and place of this accident, to exercise ordinary care and on the part of both of them the failure to exercise ordinary care constituted negligence.

If you shall find the plaintiff negligent as well as the defendant, the law now permits you to consider and compare the negligence of the defendant, if the defendant was negligent, with the negligence

of the plaintiff, if the plaintiff was negligent. It is now the law that contributory negligence of the plaintiff shall absolutely bar his recovery; but it is the rule that if the plaintiff was guilty of contributory negligence, if such negligence was slight and the negligence of the employer was greater in comparison, then the damages must be diminished by the jury in proportion to the amount of negligence attributable to such employé. As you have already been instructed, as requested, if the negligence of the plaintiff was greater than the negligence of the defendant then the plaintiff cannot recover. If their negligence was of equal degree, then the plaintiff cannot recover. But if the negligence of the plaintiff was slight and the negligence of the defendant gross in comparison, then the plaintiff may recover, but he may not recover the full damages which
189 you might award to him under the same circumstances for the same injuries were he himself free from negligence contributing to his injury. If you shall find negligence and shall find in connection with your finding of negligence that is necessary to compute an award in favor of the plaintiff, the law permits you to award to him compensation for the matters claimed in his petition. The plaintiff in his petition does not claim damages for impaired earning power nor does he claim for loss of time; he does for injuries which he says are permanent. You, therefore, will inquire as to the extent of his injuries. Before you award to the plaintiff anything for permanent injuries it is the duty of the plaintiff to show by preponderance of the evidence that he is reasonably certain hereafter to suffer damage and loss from the injuries occasioned by the negligence of defendant. It will not do for you to speculate that possibly he may or that probably he may suffer, but you must find from the evidence and a preponderance of the evidence with reasonable certainty that he will suffer and for those damages which you find reasonably certain, if you find such to be the case, you may include in your award for compensation. You may include, if you find for the plaintiff, such damages as will compensate him for any pain or suffering which you may find from the evidence he has undergone by reason of his injuries, and may give a sum which will compensate him for pain and suffering which you find from the evidence he will undergo in the future by reason of said injuries, and a sum not exceeding $25.00 for medical services incurred by him.

You are instructed that if you find for the plaintiff you must not allow him any damages for wages lost during the time he was disabled from work by his injuries. Nor are you permitted to
190 allow him any damages for any loss of earning power, present or future, caused by his injuries.

In this charge, gentlemen of the jury, the terms "care" and "reasonable care" have been used. In applying these terms you may consider that ordinary care is that degree of care which reasonable and prudent persons are accustomed to exercise under the same or similar circumstances; and according to that rule of ordinary care you will judge and determine upon the conduct both of the plaintiff and of the defendant.

The "preponderance of evidence" means the greater weight of

the evidence. It is your function and duty to consider and weigh all of the testimony and evidence here before you in order to ascertain; first, whether it has any weight, because testimony or evidence to which you attach no weight is not the basis for a finding, but if there is evidence and uncontradicted evidence to which you attach some weight, it then becomes your duty to find according to that evidence. That constitutes a preponderance of evidence. If, however, evidence is conflicting, then the preponderance of evidence is found by comparing the testimony relating to the facts, considering the probability or improbability, considering the knowledge or want of knowledge, the candor or want of candor in ascertaining the facts, all of those elements which you in your ordinary pursuits in life are accustomed to consider in determining the credibility which you will attach to statements are proper and suitable to be applied by you in judging the testimony of witnesses. In this matter you will carefully weigh all of the evidence relating to the injuries of the plaintiff; consider all of that which has been brought here
191 before you and determine whether or not the plaintiff has been permanently injured, and if he is permanently, the extent of his injury and what sum will compensate him and reimburse him in the particulars for which he has claims for damage.

Upon your retirement you will select one of your number foreman. After deliberating and reaching an agreement upon your verdict, your foreman will sign that verdict which shall express your finding and return it into court.

Mr. NORTHUP: The court said that the plaintiff must prove his allegations in regard to the permanency of the injuries.

The COURT: In order that you may be certain upon the subject, I will say to you that where prospective damages are claimed from an injury, as in this case, by the plaintiff, such damages should be limited to such damages as may be reasonably certain to result from the injuries; you are confined in such assessment to such damages as are reasonably certain to follow from the injuries of which plaintiff complains.

Thereupon the defendant by its counsel excepted to the refusal of the court to give in charge to the jury defendants' requests numbered 1, 2, 3, 4, 10, 11, 12, 13, 14, 15 and 21, separate exception being reserved to the refusal to give each request asked and refused.

Defendant by its counsel excepted especially to the refusal of the court to apply to this case the Act of Congress entitled "An Act relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases."

192 And defendant by its counsel excepted to the charge generally.

Thereupon the jury retired to consider their verdict and in due time returned into court with their verdict, which verdict was in favor of the plaintiff and against the defendant herein.

Within three days from the rendition of said verdict the defendant by its counsel filed in this court its written motion for a new trial of said cause and to set aside said verdict on the grounds therein set forth.

Said cause coming on for hearing on said motion, the same was argued by counsel for the parties respectively and considered by the court, whereupon the court overruled said motion for a setting aside of said verdict and for a new trial of said cause, to which action of the court the defendant by its counsel then and there duly excepted.

Thereupon the court rendered judgment on said verdict, to which action of the court the defendant, by its counsel then and there duly excepted.

Now comes the defendant and presents to the court this its bill of exceptions taken on said trial of said cause and prays that the same may be settled, allowed, signed, sealed by the court and ordered made a part of the record of said cause; all of which is accordingly done, on this 31st day of July, A. D. 1911.

CURTIS T. JOHNSON,
Trial Judge.

[SEAL.]

Received this bill of exceptions this 31st day of July, A. D. 1911.
CURTIS T. JOHNSON, *Judge.*

193 In the Supreme Court of the State of Ohio.

No. 13709.

OTTO E. SLAVIN, Plaintiff in Error,
vs.
TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY, Defendant in Error.

Return of Writ.

UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within writ, I hereunto transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within case, together with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of the said Supreme Court of Ohio, in the City of Columbus, this 14th day of April, 1913.

[Seal Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk Supreme Court of Ohio,
By SEBA H. MILLER, *Deputy.*

194 In the Supreme Court of the State of Ohio.

No. 13709.

OTTO E. SLAVIN, Plaintiff in Error,
vs.
TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY, Defendant in Error.

Petition of Defendant in Error for Allowance of Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

To the Honorable John A. Shauck, Chief Justice of the Supreme Court of the State of Ohio:

This petition of Toledo, St. Louis and Western Railroad Company respectfully shows as follows:

On the 21st day of March, 1910, this case was filed in the Court of Common Pleas of Lucas County, Ohio, plaintiff in error herein being plaintiff, and the defendant in error herein being defendant.

The plaintiff's petition in said case prayed Fifteen Thousand Dollars ($15,000.00) damages for personal injuries alleged to have been sustained by the plaintiff whilst in the employ of the
195 defendant, in its yards at Toledo, Lucas County, Ohio, as switchman, as a result of the alleged negligence of the defendant in constructing certain tracks in its said yards so closely together that, whilst the plaintiff in the performance of his duties was riding on the side of a freight car, which was being moved on one of said tracks, he was struck by and collided with a freight car standing upon the other of said tracks and was thereby torn from the car upon which he was riding and thrown to the ground, rolled, crushed and injured. It was further alleged in said petition that the defendant was negligent in permitting said tracks to remain in such close proximity to each other, in permitting the use of said tracks at the same time by its employes in the transportation and location of cars, in placing cars of such width on one of said tracks, and allowing them to remain there during the time that the other of said tracks was in use, and in failing and omitting to notify the plaintiff of the presence of cars upon one of said tracks at the time when the plaintiff was working upon the other track, as aforesaid.

To this petition, the defendant, Toledo, St. Louis and Western Railroad Company, filed an answer of general denial, averring further that the plaintiff was guilty of negligence contributing to his alleged injuries, in that, with knowledge of the location of the said tracks in defendant's yards, and the distance between them, and with knowledge of the fact that cars were standing upon one of said tracks, the plaintiff voluntarily and unnecessarily placed himself in a dangerous position on the outside of the car moving upon one of said tracks, and failed to exercise reasonable care in observing his

surroundings, by reason of all of which, he was struck by a car standing upon the said other track.

To this answer, the plaintiff filed a reply denying contributory negligence on his part.

196 At the trial of the said case in said Court of Common Pleas, evidence*d* was admitted, showing that the defendant, Toledo, St. Louis and Western Railroad Company, was, at the time of the occurrences complained of in the plaintiff's petition, a common carrier by railroad, engaged in interstate commerce between the several States and that the plaintiff, at the time he received his injuries, was employed by the defendant in such commerce, it appearing that the plaintiff was engaged in switching a cut of cars, coupled together, the greater number of which were cars consigned from a point in one State to a point in another State, and loaded with shipments consigned from a point in one State to a point in a different State. This proof was not contradicted.

It also appeared from the evidence, without contradiction, that the plaintiff had been in the employ of the defendant in its said yards at Toledo in different capacities for a period of approximately ten years, and that, during the whole of that period, the tracks described in the petition were constructed and laid in the same way within the same distance of each other as they were at the time of the accident to plaintiff.

At the close of all the testimony, the defendant, therefore, moved the Court for a peremptory instruction to the jury for a verdict in its favor upon the theory that the relations between the plaintiff and the defendant were governed by the act of congress, approved April 22, 1908, and entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases;" that that act permitted to the defendant the defense of assumed risk in this case, and that, as the uncontroverted evidence of the plaintiff established his knowledge of the condition of the tracks of which he complained and which he charged as negligence against the defendant, the plaintiff must, as a matter of law, be held to have assumed the risks of that condition, and be denied a recovery.

This motion was overruled by the trial court, and exception

197 taken.

Thereupon, the defendant requested the Court, in writing, to give to the jury in his charge, amongst other instructions, the following:

"You are instructed that as the uncontradicted evidence in this case shows that the defendant at the time the plaintiff received his injuries was a common carrier engaged in interstate commerce between the several states and that the plaintiff at the time he received his injuries was employed by the defendant in such commerce, the relations between the plaintiff and defendant were exclusively governed by the Act of Congress approved April 22, 1908, and entitled 'An Act relating to the Liability of Common carriers by Railroad to their Employes in certain Cases.'

"That act, so far as applicable to the case at bar, provides as follows:

" 'That every common carrier by railroad while engaging in commerce between any of the several States or Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, or other equipment.'

" 'That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employe, * * * the fact that the employe may have been guilty of contributory negligence shall not be a bar to recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; * * *'"

"You are instructed that the Act of Congress approved April 22, 1908, and entitled 'An Act Relating to the Liability of Common Carriers by railroads to their Employes in certain Cases,' and under which the plaintiff must recover, if he recover at all, does not bar the defense that the plaintiff assumed the risk of the matters and things in regard to which in his petition herein he alleges that the defendant was negligent. If, therefore, you find from the evidence that at the time of his injury the plaintiff knew, or in the exercise of reasonable care should have known, that tracks 4 and 5 were so close together that in riding upon the south side of a car moving on track 4, he could not safely pass cars standing upon track 5, and that there were or were likely to be cars standing upon track 5 at the time he was riding on the side of said car on track 4, then you are instructed that the plaintiff is not entitled to recover and your verdict herein must be for the defendant."

198 The Court, however, refused to give either of the said instructions and the defendant properly preserved an exception to the Court's ruling in this respect.

The case was then submitted by the Court to the jury under a charge based upon the so-called Employers' Liability Laws of the State of Ohio, being Secs. 6245 and 9017 of the General Code of the State of Ohio.

The Court charged, amongst other things, that the construction of the two tracks complained of in such close proximity was a "defect" under the Statutes above referred to, and that the plaintiff, although continuing in the employ of the Company after the knowledge of the defect, should not, under the Ohio Statutes, be deemed to have assumed the risk in connection therewith, and that the jury must consider that the plaintiff did not assume the risk arising from the performance of his duties on these tracks, if properly done, and if these tracks were so close together as to constitute a danger.

The defendant duly preserved its exceptions to this charge, excepting expressly to the refusal of the Court to apply to this case the act of Congress of April 22, 1908, entitled, "An act relating to the liability of common carriers by railroad to their employes in certain

cases." Being charged as aforesaid, the jury rendered a verdict of Three Thousand Dollars ($3,000.00) in favor of the plaintiff, which verdict was, subsequently by the Court, reduced to Twenty-five Hundred Dollars ($2500.00). A proper motion for a new trial was filed by the defendant, and overruled, judgment being entered for the plaintiff in the sum of Twenty-five Hundred Dollars ($2500.00).

To this judgment, the defendant thereafter filed a petition in error in the Circuit Court of Lucas County, Ohio, in which petition in error, amongst other things, the defendant complained of the error of the Court in charging the jury and of the error of the Court in refusing to give to the jury, the instructions requested by
199 the defendant as hereinbefore set forth.

Said cause came on to be heard in the said Circuit Court and was argued by counsel at the January term, 1912, and on the 17th day of February, 1912, the said Court filed its opinion, in which it held that, while the trial court was of the opinion that the case was governed by Secs. 9017 and 9018 of the General Code of Ohio and not by the act of congress, passed April 22, 1908, and its amendments, in view of the uncontroverted evidence showing that several of the cars in the train upon which the plaintiff was acting as switchman were loaded with freight to be delivered in States other than the States in which they had been loaded, and that the plaintiff was consequently at the time of his injury engaged in handling interstate commerce, and the defendant was, at the same time a common carrier by railroad, engaged in such commerce, the case was governed by the said act of congress, and not by the Ohio Statutes above referred to. The said Court further held that the evidence showed that the plaintiff was an experienced railroad man, thoroughly acquainted with conditions existing in the defendant's yard, of which he complained, and must be held to have assumed the risks incident to his position as a switchman, and that, under the act of congress of April 22, 1908, the plaintiff was not, therefore, entitled to recover for the injuries he had sustained.

The court, therefore, held that the defendant's motion for a directed verdict at the close of the evidence should have been granted, reversed the judgment of the Court of Common Pleas for error in overruling this motion, and entered judgment in favor of the defendant, as it held the trial court should have done. This judgment was entered on the 22nd day of March, 1912. A certified copy of the opinion of the Circuit Court is hereto attached and made a part hereof, marked "Exhibit A."

To this judgment, the plaintiff filed his petition in error in the Supreme Court of the State of Ohio on the 19th day of July, 1912.

In his brief, the sole contention made was that, by the act
200 of April 22, 1908, congress had failed to cover the entire field of assumed risk. That, in Sec. 4 of said act, providing that in any action brought against any common carrier, under or by virtue of any of the provisions of this act to recover damages for injuries to, or death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation, by such common carrier, of any Statute

enacted for the safety of employes contributed to the injury or death of such employe, Congress had covered only a portion of the entire field or subject of assumed risk, that is to say, the application of said doctrine in certain cases; and that, therefore, the State of Ohio, having jurisdiction to legislate on this subject, in the absence of legislation by congress, could still legislate as to those parts of the field or subject which the congressional legislation did not cover. That, consequently, Secs. 6245 and 9017 of the General Code of the State of Ohio, which abolished the defense of assumed risk in all cases where the accident grew out of a defect in any of the employer's appliances were still applicable to this case.

Subsequently, by leave of Court, one O. S. Brumback, an attorney of Lucas County, filed his brief as amicus curiæ, in which he raised the further point that the act of congress of April 22, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases" and particularly the provisions of Secs. 1 and 5 of said act, taken together, must be considered to abolish the entire doctrine of assumed risk. On the other hand, this defendant in error, in its brief, contended that congress, having, by the act of April 22, 1908 aforesaid, undertaken to regulate the entire subject of the liability of common carriers by railroad to their employes, had by that act assumed the control of the entire subject and had thereby superseded all State legislation upon the same subject. That the action of congress in abolishing, by Sec. 4, the defense of assumed risk in a certain class of cases, and
201 its silence on the subject of this defense in other classes of cases is declaratory of its intention that in all cases, excepting those mentioned in Sec. 4, the defense of assumed risk shall remain available to the employer and that the said act of April 22, 1908, cannot, in view of the language used in Sec. 4, and without rendering Sec. 4 meaningless, be construed to abolish the defense of assumed risk in all cases.

These were the only contentions raised by the parties in this Court, and the case, therefore, presented to this Court a federal question, to-wit, the construction of the said act of congress of April 22, 1908, in respect to the defense of assumed risk as between carriers by railroad engaged in interstate commerce and their employes employed in such commerce, and whether the said act of congress superseded all State legislation upon the same subject, and particularly the said Secs. 6245 and 9017 of the General Code of the State of Ohio.

This case was duly heard by this Court on oral argument, and on the 18th day of March, 1913, this Court reversed the judgment of the Circuit Court and affirmed the judgment of the Court of Common Pleas, without, however, rendering any opinion. Under the issues made in this case, and the questions presented to this Honorable Court for its determination, such action can only have been based upon a finding by this Honorable Court, either that the said act of Congress of April 22, 1908 must be construed as abolishing in its entirety the defense of assumed risk, notwithstanding the language used in Sec. 4 of said act, or that the said act of congress has

not superseded State legislation upon the subject of the liability of carriers by railroad engaged in interstate commerce to their employes employed in such commerce and especially Secs. 6245 and 9017 of the General Code of the State of Ohio, and that, notwithstanding the passage of said act of congress, that part of the aforesaid sections of the General Code of the State of Ohio, which
202 abolishes the defense of assumed risk, is still in force in cases of this character.

Your petitioner further says that the said judgment of this Honorable Court, was, and is a final judgment in the highest Court of the State of Ohio, in which a decision in this action could or can be had, and that a federal question was made in said action as hereinbefore set forth, and that said judgment of this Honorable Court was repugnant to and in conflict with the laws of the United States, and particularly the said act of congress of April 22, 1908, and that a decision of said federal question was necessary to the judgment rendered.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of this Honorable Court in said cause, and prays that a writ of error to the said Supreme Court of the United States be allowed; that citation be granted and signed; that the bond herewith presented be approved, and that upon compliance with the terms of the statutes in such cases made and provided, said bond and writ of error may operate as a supersedeas; that the errors complained of may be reviewed in the Supreme Court of the United States, and the judgment aforesaid of this, the Supreme Court of the State of Ohio, may be reversed.

TOLEDO, ST. LOUIS AND WESTERN
RAILROAD COMPANY,
By CLARENCE BROWN,
CHARLES A. SCHMETTAU,
Its Counsel and Attorneys.

The writ of error as prayed for in the foregoing petition is hereby allowed this 22 day of March, 1913, the writ of error to
203 operate as a supersedeas and the bond for that purpose is fixed at the sum of Twenty-five Hundred Dollars.

Dated this 22 day of March, 1913, at Columbus.

JOHN A. SHAUCK,
Chief Justice of the Supreme Court
of the State of Ohio.

Filed in my office the 22 day of March, 1913.

FRANK E. McKEAN,
Clerk of the Supreme Court
of the State of Ohio.

204

EXHIBIT A.

In the Circuit Court of Lucas County, Ohio.

No. 2694 C. C. No. 62645 C. P.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY
vs.
OTTO E. SLAVIN.

Error to the Common Pleas Court of Lucas County, Ohio.

Feb. 17, 1912.

Brown, Geddes, Schmettau & Williams, for plaintiff in error.
C. S. Northup and C. H. Masters, for defendant in error.

KINKADE, J.:

This was an action in the Court of Common Pleas to recover damages for a personal injury sustained by Mr. Slavin while in the employ of the railroad company as a switchman in its yards in Toledo, Ohio, on the 19th day of August, 1910, by being crushed between the car on which he was riding and a car standing upon a parallel track. The jury returned a verdict in his favor for $3000.00. The Court gave the plaintiff the option of submitting to a new trial or reducing the amount of the verdict $500.00. The plaintiff elected to remit $500.00 and thereupon the motion for a new trial was overruled, and judgment entered in plaintiff's favor for $2500.00.

Many assignments of error are presented here upon which it is claimed the judgment below should be reversed. Some of these are well taken and others are not. As we view this case, it is not necessary to discuss in detail these alleged errors.

The trial court was of the opinion that the case was governed by sections 9017 and 9018 of the General Code of Ohio and not by the act of Congress passed April 22, 1908, and the amendment thereto, April 5, 1910, covering the same subject, and the case was tried accordingly.

The evidence clearly shows that several of the cars in the train upon which Mr. Slavin was acting as switchman were loaded
205 with freight to be delivered in states other than the states in which they had been loaded, and that consequently Mr. Slavin, at the time of his injury, was connected with and engaged in handling interstate commerce, and this being true, the Federal Act covering the relations of employer to employee so engaged in interstate commerce, must apply. This question was definitely and fully settled by a decision of the Supreme Court of the United States, rendered January 15, 1912, in four cases then pending in that Court, each involving similar principles:

1st. Edgar G. Mondau vs. New York, New Haven & Hartford Railroad Co. 120.

2nd. The Northern Pacific Railway Co. vs. Bessie Babcock, Administratrix, 170.

3rd. The New York, New Haven & Hartford Railroad Co. vs. Mary Agnes Walsh, Administratrix, 289.

4th. Mary Agnes Walsh, Administratrix, vs. The New York, New Haven & Hartford Railroad Co. 290.

We have been furnished by counsel with a copy of the opinion in these cases by Mr. Justice Van Devanter, and have examined it with care. It is quite unnecessary to indulge in any extended comment concerning this very able, lucid and comprehensive opinion. It covers the entire subject in every respect.

Under the Federal Act, assumed risk, except in cases where there is a violation of statute relative to the safety of appliances, etc., used by railroad companies, remains a defense available to the railroad company in an action of this character.

The plaintiff was an experienced railroad man who had worked several years in the yards where he was injured; he knew the location of the tracks and method of handling business in these yards quite as well as the railroad company did. This is clearly shown by his own evidence. The mere fact, if it be a fact, that he did not have actual knowledge that there were cars upon track No. 5, as he came down on track No. 4 on the night of his injury, does not alter the situation at all. It is common knowledge that the tracks in the railroad yards are used for the storing, temporarily, of cars and for the purpose of shifting cars in the making
206 up of trains. Railroad tracks are not constructed for any purpose except to haul railroad cars over. The presence of a railroad track in a railroad yard is itself ample notice to an experienced railroad man that cars may be standing or moving thereon at any time, and no one could know better than he the dangers incident to riding through a railroad yard, in the dark, standing in a stirrup on the side of a car. It is not the duty of a railroad company to send runners through its yards for the purpose of giving notice to experienced employees that cars are being shifted from one position to another. That is the general business that is being carried on in a yard, and a notice of conditions existing at any given time, might be of no avail a few minutes later. No one contends that any such practice prevails in any railroad yard. Mr. Slavin, being thoroughly acquainted with the conditions existing in this railroad yard, must be held to have assumed the risks incident to his employment as a switchman there. It is our opinion that, even giving the evidence the most favorable construction possible for Mr. Slavin, there can be no recovery, in view of the Federal Act, for the injury he has sustained.

The motion of the railroad company for a directed verdict in its favor at the close of the evidence should have been granted. For the error in overruling this motion, the judgment of the Court of Common Pleas will be reversed and judgment will be entered here

in favor of the railroad Company, as it should have been in the trial court.

Wildman and Richards, JJ., concur.

Approved.

R. R. KINKADE, *J.*

207 THE STATE OF OHIO,
Lucas County, ss:

I, W. T. Huntsman, Clerk of the Common Pleas Court, and the Court of Appeals, within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct copy of the opinion of the Circuit Court in the case of "Toledo, St. Louis & Western Railroad Co. vs. Otto E. Slavin, No. 2694 C. C. —, and filed in my office on the 17th day of February, 1912.

In testimony whereof, I have hereunto subscribed my name officially, and affixed the Seal of said Court, at the Court House in Toledo, in said County, this 19th day of March, A. D. 1913.

[Seal the Court of Appeals of Ohio, Lucas County.]

W. T. HUNTSMAN, *Clerk.*
By M. E. THEUERKAUFF,
Deputy Clerk.

208 [Endorsed:] No. 2694 C. C. Circuit Court of Lucas County, Ohio. Toledo, St. Louis & Western Railway Company vs. Otto E. Slavin. Certified Copy of Opinion. Filed Feb. 17, 1912. Lucas Co. Circuit Court. W. T. Huntsman, Clerk.

209 [Endorsed:] In the Supreme Court of the State of Ohio. No. 13709. Otto E. Slavin, Plaintiff in Error, vs. Toledo, St. Louis and Western Railroad Company, Defendant in Error. Petition of Defendant in Error for allowance of writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio. Filed Mar. 22, 1913. Supreme Court of Ohio. Frank E. McKean, Clerk. Clarence Brown, Gen'l Solicitor. Chas. A. Schmettau, Ass't Gen'l Solicitor. —— ——, Local Attorney.

210 In the Supreme Court of the State of Ohio.

No. 13709.

OTTO E. SLAVIN, Plaintiff in Error.
vs.
TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY, Defendant in Error.

Assignment of Errors on Writ of Error from the Supreme Court of the United States.

Now comes the defendant in error and respectfully submits that in the record, proceedings, decision and final judgment of the

Supreme Court of the State of Ohio, in the above entitled matter, there is manifest error in this, to-wit:

First. The said Supreme Court erred in reversing the judgment of the Circuit Court of Lucas County, Ohio, and in affirming the judgment of the Common Pleas Court of Lucas County, Ohio, thereby depriving this defendant in error of right, privileges and immunities secured to it by the Act of Congress of April 22nd, 1908, entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," to-wit, in this case:

211 the defense that the plaintiff in error had assumed the risk of the defects complained of in his petition.

Second. The said Supreme Court erred in reversing the judgment of the Circuit Court of Lucas County, Ohio, by which said judgment said Circuit Court held that this case was governed by the Act of Congress passed April 22nd, 1908, and entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," and held that this defendant in error had, under said Act of Congress, established a complete defense to this action, which defense would not have been available to this defendant in error, if this case was, as held by the Common Pleas Court of Lucas County, aforesaid, and by the Supreme Court, in affirming the judgment of said Common Pleas Court, governed by sections 6245 and 9017 of the General Code of the State of Ohio.

Third. The said Supreme Court erred in reversing the judgment of the Circuit Court of Lucas County, Ohio, whereby said Circuit Court held that the said sections 6245 and 9017 of the General Code of the State of Ohio were superseded by the Act of Congress of April 22nd, 1908, entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases."

Fourth. The said Supreme Court erred in affirming the judgment of the Court of Common Pleas of Lucas County, Ohio, whereby said Court of Common Pleas held that this case was governed by sections 6245 and 9017 of the General Code of the State of Ohio, and not by the Act of Congress of April 22nd, 1908, entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," and that the said Statutes of the State of Ohio were not in conflict with, and were not superseded by, said Act of Congress.

212 Fifth. The said Supreme Court erred in affirming the judgment of the Common Pleas Court of Lucas County, Ohio, thereby affirming the action of said Court in refusing to give to the jury the following instruction requested by the defendant in error, to-wit:

"You are instructed that as the uncontradicted evidence in this case shows that the defendant at the time the plaintiff received his injuries was a common carrier engaged in interstate commerce between the several states and that the plaintiff at the time he received his injuries was employed by the defendant in such commerce, the relations between the plaintiff and defendant were exclusively governed by the Act of Congress approved April 22, 1908, and entitled:

'An Act relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases.'

"That act, so far as applicable to the case at bar, provides as follows:

" 'That every common carrier by railroad while engaging in commerce between any of the several States or Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, or other equipment.'

" 'That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employe, * * *, the fact that the employe may have been guilty of contributory negligence shall not be a bar to recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; * * *,"

notwithstanding that it was proved in said case, without contradiction, that at the time the plaintiff in error received his alleged injuries he was employed in interstate commerce by the defendant in error, which was at the time, a common carrier by railroad engaged in interstate commerce.

Sixth. The said Supreme Court erred in affirming the judg-
213 ment of the Court of Common Pleas of Lucas County, Ohio, thereby affirming the action of said Court in refusing to give to the jury the following instruction requested by this defendant in error, to-wit:

"You are instructed that the Act of Congress approved April 22, 1908, and entitled: 'An Act relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases,' and under which the plaintiff must recover, if he recover at all, does not bar the defense that the plaintiff assumed the risk of the matters and things in regard to which in his petition herein he alleges that the defendant was negligent. If, therefore, you find from the evidence that at the time of his injury the plaintiff knew, or in the exercise of reasonable care should have known, that tracks 4 and 5 were so close together that in riding upon the south side of a car moving on track 4, he could not safely pass cars standing upon track 5, and that there were or were likely to be cars standing upon track 5 at the time he was riding on the side of said car on track 4, then you are instructed that the plaintiff is not entitled to recover and your verdict herein must be for the defendant."

notwithstanding that it was proved in this case, without contradiction, that at the time the plaintiff in error received his alleged injuries he was employed in interstate commerce by the defendant in error, which was at the time, a common carrier by railroad engaged in interstate commerce.

Seventh. The said Supreme Court erred in affirming the judgment of the Court of Common Pleas of Lucas County, Ohio, thereby affirming the action of said Court in charging the jury as follows:

"The legislature has regulated by recent acts this branch of the law so that an employé of a railroad company who is injured as the result of a defect shall not be deemed to have assumed the risk in connection therewith, although continuing in the employ of the company after knowledge of the defect. The distance between the tracks, the location of tracks four and five, if those tracks were at such a distance apart as was not sufficient to enable the plaintiff safely to perform his duties, was a defect within the meaning of this act. A defect means a blemish or imperfection. The yard- of the defendant and the tracks laid in the yards are to be considered to-
214 gether as one structure and you will therefore consider that the plaintiff did not assume the risk arising from the performance of his duty on these tracks, if properly done, if these tracks were so close together as to constitute a danger,"

notwithstanding that it was proved in said case, without contradiction, that at the time the plaintiff in error received his alleged injuries he was employed in interstate commerce by the defendant in error, which was at the time, a common carrier by railroad engaged in interstate commerce, and that the rights and liabilities of the parties to this action were therefore exclusively defined by the Act of Congress of April 22nd, 1908, entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases," and not by the Statutes of the State of Ohio as charged by the Court, and that under said Act of Congress the defendant in error was entitled in this case to avail itself of the defense of assumption of the risk.

Eighth. The Supreme Court erred in affirming the judgment of the Court of Common Pleas of Lucas County, Ohio, thereby affirming the action of said Court in overruling the motion of the defendant in error at the close of all the evidence for the direction of a verdict in its favor, although, under the Act of Congress of April 22nd, 1908, entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases," the defendant in error, by reason of the uncontradicted proof showing knowledge on the part of the plaintiff if error of the defective conditions complained of in his petition and his assumption of the risk thereof, was, as a matter of law, entitled to the direction of such a verdict.

215 Wherefore, the said Toledo, St. Louis and Western Railroad Company prays that the judgment and decision aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it has lost by the action and because of the said judgment and decision.

CLARENCE BROWN.
CHARLES A. SCHMETTAU.
Attorneys and of Counsel for Defendant in Error.

216 [Endorsed:] In the Supreme Court of the State of Ohio. No. 13709. Otto E. Slavin, Plaintiff in Error, vs. Toledo, St. Louis and Western Railroad Company, Defendant in Error. Assignment of errors on writ of error from the Supreme Court of the United States. Filed Mar. 22, 1913. Supreme Court of Ohio. Frank E. McKean, Clerk. Clarence Brown, Gen'l Solicitor; Chas. A. Schmettau, Ass't Gen'l Solicitor; —— ——, Local Attorney.

217 In the Supreme Court of the State of Ohio.

No. 13709.

OTTO E. SLAVIN, Plaintiff in Error,
vs.
TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY, Defendant in Error.

Order Allowing Writ of Error to the Supreme Court of the State of Ohio.

The above entitled matter came on to be heard upon the petition of Toledo, St. Louis and Western Railroad Company, defendant in error, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio, and, upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States questions presented by the record in said matter,

It is ordered that a writ of error be, and is hereby, allowed to this Court from the Supreme Court of the United States and that the bond presented by said petitioner be, and the same is hereby, approved.

JOHN A. SHAUCK,
Chief Justice of the Supreme Court of the State of Ohio.

218 [Endorsed:] In the Supreme Court of the State of Ohio. No. 13709. Otto E. Slavin vs. Toledo, St. Louis & Western Railroad Company. Order Allowing Writ of Error from the Supreme Court of the United States. Filed Mar. 22, 1913. Supreme Court of Ohio. Frank E. McKean, Clerk. Clarence Brown, Gen'l Solicitor; Chas. A. Schmettau, Ass't Gen'l Solicitor; —— ——, Local Attorney.

219 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Ohio before you or some of you, being the highest

Court of law or equity of the said State, in which a decision could be had in the said suit between Otto E. Slavin, plaintiff in error, and Toledo, St. Louis and Western Railroad Company, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the constitution or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of said constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Toledo, St. Louis and Western Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you may have the same at Washing-
220 ton on the 19 day of April, Nineteen Hundred and Thirteen, in the said Supreme Court, to be then and there held, that the records and proceedings aforesaid being inspected, the said Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court of the United States, the 22" day of March, in the year of our Lord, Nineteen Hundred and Thirteen.

[Seal United States District Court, Southern Dis. Ohio.]

B. E. DILLEY,
Clerk of the District Court of the United States for the Southern District of Ohio.

Allowed:

JOHN A. SHAUCK,
Chief Justice of the Supreme Court of the State of Ohio, said Supreme Court Being the Court of Last Resort in said State.

221 [Endorsed:] In the Supreme Court of the State of Ohio. No. 13709. Otto E. Slavin, Plaintiff in Error, vs. Toledo, St. Louis and Western Railroad Company, Defendant in Error. Writ of Error. Filed Mar. 22, 1913. Supreme Court of Ohio. Frank E. McKean, Clerk. Clarence Brown, Gen'l Solicitor; Chas. A. Schmettau, Ass't Gen'l Solicitor; —— ——, Local Attorney.

222 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

Citation.

To Otto E. Slavin, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Ohio, wherein Toledo, St. Louis and Western Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment, rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John A. Shauck, Chief Justice of the Supreme Court of Ohio, this twenty second day of March, in the year of our Lord, Nineteen Hundred and Thirteen and of the Independence of the United States the one hundred and thirty-seventh.

JOHN A. SHAUCK,
Chief Justice of the Supreme Court
of the State of Ohio.

I hereby acknowledge receipt of copy of the above citation and accept service thereof this 24th day of March, 1913.

OTTO E. SLAVIN,
By CHARLES H. MASTERS, AND
KOHN, NORTHUP & MORGAN,
His Attorneys of Record.

Filed Mar. 25, 1913. Supreme Court of Ohio. Frank E. McKean, Clerk.

223 [Endorsed:] 13709. In the Supreme Court of the United States. Toledo, St. Louis & Western Railroad Company, Plaintiff in Error, vs. Otto E. Slavin, Defendant in Error. Citation and Acceptance of Service. Filed Mar. 22, 1913. Supreme Court of Ohio. Frank E. McKean, Clerk. Clarence Brown, Gen'l Solicitor; Chas. A. Schmettau, Ass't Gen'l Solicitor; —— ——, Local Attorney.

224 In the Supreme Court of Ohio.

No. 13709.

OTTO E. SLAVIN, Plaintiff in Error,
vs.
TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY, Defendant in Error.

COLUMBUS, OHIO, March 25, 1913.

I, E. O. Randall, Official Reporter of the Supreme Court of Ohio, do hereby certify that the said Supreme Court rendered no opinion in the above entitled case.

E. O. RANDALL,
Official Reporter.

225 [Endorsed:] In the Supreme Court of Ohio. No. 13709. Otto E. Slavin, Plaintiff in Error, vs. Toledo, St. Louis and Western Railroad Company, Defendant in Error. Certificate of Supreme Court Reporter. Filed Mar. 25, 1913. Supreme Court of Ohio. Frank E. McKean, Clerk. Clarence Brown, Gen'l Solicitor; Chas. A. Schmettau, Ass't Gen'l Solicitor; —— ——, Local Attorney.

226 In the Supreme Court of the State of Ohio.

No. 13709.

OTTO E. SLAVIN, Plaintiff in Error,
vs.
TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY, Defendant in Error.

Bond on Writ of Error from the Supreme Court of the United States.

Know all men by these presents, That, we, Toledo, St. Louis & Western Railroad Company, as principal, and National Surety Company, as surety, are held and firmly bound unto Otto E. Slavin in the sum of Twenty-five hundred dollars ($2,500.00) to be paid to the said Slavin, his heirs, executors, administrators and assigns, to the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this 22nd day of March, 1913.

Whereas, the above named Toledo, St. Louis and Western Railroad Company has prosecuted a Writ of Error from the Supreme Court of the United States to reverse the judgment rendered in the above entitled action in the Supreme Court of the State of Ohio.

227 Now, therefore, the condition of this obligation is such that if the above named Toledo, St. Louis & Western Rail-

road Company, shall prosecute its said Writ of Error to effect and answer all costs and damages if it shall fail to make good its plea, then this agreement shall be void; otherwise to remain in full force and effect.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY,
By W. L. ROSS, *President.*

[Seal of Railroad Company.]

Attest:
M. L. CROWELL,
Ass't Secretary.

NATIONAL SURETY COMPANY,
By LLOYD T. WILLIAMS,
Attorney-in-fact.

[Seal of Surety Company.]

STATE OF OHIO,
Lucas County, ss:

On this 18th day of March, 1913, personally appeared before me Walter L. Ross, who, being duly sworn, deposes and says that he is the president of Toledo, St. Louis & Western Railroad Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed on behalf of said corporation, by authority of its Board of Directors, and the said Walter L. Ross acknowledged said instrument to be the free act and deed of said corporation.

[NOTARY SEAL.] RAYMOND T. GARRISON,
Notary Public in and for Lucas County, Ohio.

228 & 229 STATE OF OHIO,
Lucas County, ss:

On this 18th day of March, 1913, personally appeared before me Lloyd T. Williams, who being duly sworn, deposes and says that he is an attorney in fact of National Surety Company, duly authorized by said Company to subscribe its corporate name and attach its corporate seal to judicial bonds; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and the said Lloyd T. Williams acknowledged said instrument to be the free act and deed of said corporation.

[NOTARY PUBLIC.] RAYMOND T. GARRISON,
Notary Public in and for Lucas County, Ohio.

I hereby approve the foregoing bond and surety this 22nd day of March, 1913.

JOHN A. SHAUCK,
Chief Justice of the Supreme Court of the State of Ohio.

Docket Entries.

Attorneys.	Title of case.	Action.	Fees & costs.	Paid by—
C. H. Masters; Kohn, Northup & Morgan, Toledo.	Otto E. Slavin vs. Toledo, St. Louis & Western Railroad Company.	Error to the Circuit Court of Lucas County.	Petition $5.00	Kohn, N. & M.
			Motion 2.00	" " " "
			do. 2.00	Lloyd T. Williams.
Clarence Brown,			" 2.00	O. S. Brumback.
Charles Schmettau,			" 2.00	Chas. Schmettau.
Lloyd T. Williams, Toledo.			Printing Record. 97.50	Kohn, N. & M.

Date.	Memoranda of pleadings, &c., filed; writs issued, &c.	Judgments, orders, &c.
1912.		
July 19.	Petition in Error, Waiver of Summons, Circuit Court. Transcript, Original Papers & Bill of Exceptions filed.	
" "	Papers taken by Toledo Legal Brief & Record Co.	
Sep. 3.	" returned.	
" "	Printed Record filed.	
" 5.	Proof of Service filed.	
" 11.	Printer's Bill filed.	
Oct. 17.	Plaintiff's printed brief filed.	
" 19.	Proof of Service filed.	
" "	Request for oral argument filed by def't's counsel.	
" 21.	Motion by Pl't'ff to advance, Notice and Affidavit, filed.	
" "	Consent to granting of Motion and request for 60 days' extension to file brief, filed by Def't.	

Dec. 4. Motion by Def't to extend time to file brief to Jan. 17, 1913, and consent, filed.

Nov. 12, 1912. Motion by Pl't'ff to advance Allowed. J. 25, p. 492.

Dec. 10, 1912. Motion by Def't to extend time to file brief to Jan. 17, 1913, Allowed. J. 25, p. 527.

1913.

Jan. 14. Motion by Orville S. Brumback, attorney not of record, for leave to file Brief, and Notice, filed.
" 16. Defendant's Printed Brief filed.
" 20. Proof of Service filed.

Jan. 21, 1913. Motion by O. S. Brumback, Att'y not of record for leave to file brief Allowed. J. 25, p. 565.

Jan. 27. Brief on the Law filed by Orville S. Brumback.
" 28. Motion by Def't for leave to file Supplemental Brief, and Consent, filed.
" 29. Proof of Service of Brumback brief filed.

Feb. 4, 1913. Motion by Def't for leave to file Supplemental Brief Sustained by Consent. J. 25, p. 577.

231

Feb. 13. Additional Points and Authorities for oral argument and Proof of Service filed by Plaintiff.
" 17. Additional Points for oral argument filed by Def't.
" 17. Def't's Supplemental Brief filed.
" 19. Proof of Service filed.

Date.	Memoranda of pleadings, &c., filed; writs issued, &c.	Judgments, orders, &c.
		March 18, 1913. Judgment of the Circuit Court Reversed and that of the Court of Common Pleas Affirmed. J. 26, p. 10.
Mar. 25.	Mandate Issued.	
" 25.	Original Papers sent to Clerk.	
Mar. 22.	Certified copy of opinion of Circuit Court filed.	
" 22.	Petition of Def't for Writ of Error, Order allowing Writ of Error, Assignment of Errors, Writ of Error, Bond on Writ of Error, $2,500, with National Surety Company, N. Y., as surety, and Citation, filed.	
Mar. 22.	Citation taken by Charles K. Schmettau, Att'y foe def't.	
" "	Citation returned.	
" 25.	Acknowledgement by Pl't'ff of receipt of copy of citation and acceptance of service thereof, filed.	
" "	Certificate of Supreme Court Reporter as to no opinion filed.	

Journal Entries.

1912.

Nov. 12. Motion by plaintiff to advance Cause No. 13709 on the General Docket.

"It is ordered by the Court that this motion be and the same is hereby allowed."

Dec. 10. Motion by defendant to extend time to file brief to January 17, 1913 in Cause No. 13709, on the General Docket.

"It is ordered by the Court that this motion be and the same is hereby allowed."

1913.

Jan. 21. Motion by Orville S. Brumback, Attorney not of Record, for leave to file brief in Cause No. 13709 on the General Docket.

"It is ordered by the Court that this motion be and the same is hereby allowed."

232

Feb. 4. Motion by defendant for leave to file supplemental brief in Cause No. 13709 on the General Docket.

"It is ordered by the Court that this motion be and the same is hereby allowed by consent."

Mar. 18. "This cause came on to be heard upon the transcript of the Record of the Circuit Court of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said Circuit Court be, and the same hereby is, reversed; and this Court proceeding to render the judgment which said Circuit Court should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be and the same hereby is affirmed.

It is further considered and adjudged that the plaintiff in error recover of the defendant in error his costs expended in the Circuit Court and in this Court, taxed at $—.

It is certified that, upon the argument of the foregoing cause in this Court, counsel for the Defendant in Error, Toledo, St. Louis & Western Railroad Company, contended that the judgment of the Court of Common Pleas, in said cause, was in violation of the Act of Congress, of April 22, 1908, entitled: "An Act relating to the liability of common carriers by railroad to their employes in certain cases," and said contention was overruled by the judgment of this Court.

Ordered, That a special Mandate be sent to the Court of Common Pleas of Lucas County, to carry this Judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Lucas County, "for entry." "

233 *Certificate.*

In the Supreme Court of the State of Ohio.

No. 13709.

OTTO E. SLAVIN, Plaintiff in Error,
vs.
TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY, Defendant in Error.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, writ of error, citation and acceptance of service thereof and certificate of Supreme Court Reporter are the original papers filed in this Court in the above entitled cause; that the foregoing copy of bond is a true and correct copy of the original bond filed in said cause; that the printed copy of the record attached hereto is a true and correct copy of the printed record filed in said Supreme Court and used in consideration of said cause; that the foregoing transcript of the docket and journal entries is truly taken and correctly copied from the records of said Court.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, this 14th day of April, A. D. 1913.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio,
By SEBA H. MILLER, *Deputy.*

234 & 235 *Certificate of Lodgment.*

In the Supreme Court of the State of Ohio.

No. 13709.

OTTO E. SLAVIN, Plaintiff in Error,
vs.
TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY, Defendant in Error.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that there was lodged with me, as said Clerk, on March 22, 1913, in the above entitled cause the following:

1. Original Bond of which a copy is herein set forth.
2. Two copies of Writ of Error as herein set forth; one for defendant in error and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at my office in Columbus, Ohio, this 14th day of April, 1913.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk Supreme Court of Ohio,
By SEBA H. MILLER, *Deputy,*

236 In the Supreme Court of the United States, October Term, 1912.

No. 1062.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY, Plaintiff in Error,
vs.
OTTO E. SLAVIN, Defendant in Error.

Statement of Errors Relied upon and of Parts of Record to be Printed.

The plaintiff in error, at the hearing of this cause, will rely upon the following errors as set forth in its assignment of errors filed herein, to-wit:

First. The said Supreme Court erred in reversing the judgment of the Circuit Court of Lucas County, Ohio, and in affirming the judgment of the Common Pleas Court of Lucas County, Ohio, thereby depriving this plaintiff in error of rights, privileges and immunities secured to it by the Act of Congress of April 22nd, 1908, entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases," to-wit, in this case: the defense that the defendant in error had assumed the risk of the defects complained of in his petition.

237 Second. The said Supreme Court erred in reversing the judgment of the Circuit Court of Lucas County, Ohio, by which said judgment said Circuit Court held that this case was governed by the Act of Congress passed April 22nd, 1908, and entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases," and held that this plaintiff in error had, under said Act of Congress, established a complete defense to this action, which defense would not have been available to this plaintiff in error, if this case was, as held by the Common Pleas Court of Lucas County, aforesaid, and by the Supreme Court, in affirming the judgment of said Common Pleas Court, governed by sections 6245 and 9017 of the General Code of the State of Ohio.

Third. The said Supreme Court erred in reversing the judgment of the Circuit Court of Lucas County, Ohio, whereby said Circuit

Court held that the said sections 6245 and 9017 of the General Code of the State of Ohio were superseded by the Act of Congress of April 22nd, 1908, entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases."

Fourth. The said Supreme Court erred in affirming the judgment of the Court of Common Pleas of Lucas County, Ohio, whereby said Court of Common Pleas held that this case was governed by sections 6245 and 9017 of the General Code of the State of Ohio, and not by the Act of Congress of April 22nd, 1908, entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases," and that the said Statutes of the State of Ohio were not in conflict with, and were not superseded by, said Act of Congress.

238 Fifth. The said Supreme Court erred in affirming the judgment of the Common Pleas Court of Lucas County, Ohio, thereby affirming the action of said Court in refusing to give to the jury the following instruction requested by the plaintiff in error, to-wit:

"You are instructed that as the uncontradicted evidence in this case shows that the defendant at the time the plaintiff received his injuries was a common carrier engaged in interstate commerce between the several states and that the plaintiff at the time he received his injuries was employed by the defendant in such commerce, the relations between the plaintiff and defendant were exclusively governed by the Act of Congress approved April 22, 1908, and entitled: 'An Act relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases.'

"That act, so far as applicable to the case at bar, provides as follows:

" 'That every common carrier by railroad while engaging in commerce between any of the several States or Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, or other equipment.'

" 'That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employé, * * * the fact that the employé may have been guilty of contributory negligence shall not be a bar to recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé; * * *,"

notwithstanding that it was proved in said case, without contradiction, that at the time the defendant in error received his alleged injuries he was employed in interstate commerce by the plaintiff in error which was at the time, a common carrier by railroad engaged in interstate commerce.

Sixth. The said Supreme Court erred in affirming the judgment

of the Court of Common Pleas of Lucas County, Ohio, thereby affirming the action of said Court in refusing to give to the jury the following instruction requested by this plaintiff in error
239 to-wit:

"You are instructed that the act of Congress approved April 22, 1908, and entitled: 'An Act relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases,' and under which the plaintiff must recover, if he recover at all, does not bar the defense that the plaintiff assumed the risk of the matters and things in regard to which in his petition herein he alleges that the defendant was negligent. If, therefore, you find from the evidence that at the time of his injury, the plaintiff knew, or in the exercise of reasonable care should have known, that tracks 4 and 5 were so close together that in riding upon the south side of a car moving on track 4, he could not safely pass cars standing upon track 5, and that there were, or were likely to be, cars standing upon track 5 at the time he was riding on the side of said car on track 4, then you are instructed that the plaintiff is not entitled to recover and your verdict herein must be for the defendant."

notwithstanding that it was proved in this case, without contradiction, that at the time the defendant in error received his alleged injuries he was employed in interstate commerce by the plaintiff in error which was at the time a common carrier by railroad engaged in interstate commerce.

Seventh. The said Supreme Court erred in affirming the judgment of the Court of Common Pleas of Lucas County, Ohio, thereby affirming the action of said Court in charging the jury as follows:

"The legislature has regulated by recent acts this branch of the law so that an employé of a railroad company who is injured as the result of a defect shall not be deemed to have assumed the risk in connection therewith, although continuing in the employ of the company after knowledge of the defect. The distance between the tracks, the location of tracks four and five, if those tracks were at such a distance apart as was not sufficient to enable the plaintiff safely to perform his duties, was a defect within the meaning of this act. A defect means a blemish or imperfection. The yard of the defendant and the tracks laid in the yards are to be considered together as one structure and you will therefore consider that the plaintiff did not assume the risk arising from the performance of his duty on these tracks, if properly done, if these tracks were so close together as to constitute a danger,"

240 notwithstanding that it was proved in said case, without contradiction, that at the time the defendant in error received his alleged injuries he was employed in interstate commerce by the plaintiff in error, which was, at the time, a common carrier by railroad engaged in interstate commerce, and that the rights and liabilities of the parties to this action were therefore exclusively defined by the Act of Congress of April 22nd, 1908, entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases," and not by the Statutes of the State of

Ohio as charged by the Court, and that, under said Act of Congress, the plaintiff in error was entitled in this case to avail itself of the defense of assumption of the risk.

Eighth. The Supreme Court erred in affirming the judgment of the Court of Common Pleas of Lucas County, Ohio, thereby affirming the action of said Court in overruling the motion of the plaintiff in error at the close of all the evidence for the direction of a verdict in its favor, although, under the Act of Congress of April 22nd, 1908, entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases," the plaintiff in error, by reason of the uncontradicted proof showing knowledge on the part of the defendant in error of the defective conditions complained of in his petition and his assumption of the risk thereof, was, as a matter of law, entitled to the direction of such a verdict.

241 For the proper consideration of the said errors the plaintiff in error deems it necessary and hereby requests the Clerk to cause to be printed the following portions of the record herein:

1. Return and certificate by Clerk of the Supreme Court of Ohio.
2. Petition for allowance of Writ of Error.
3. Assignment of errors.
4. Order allowing Writ of Error.
5. Writ of Error.
6. Citation.
7. Reporter's certificate that the Supreme Court of Ohio rendered no opinion in this case.
8. Bond on Writ of Error.
9. Copy of docket entries.
10. Certificate of the Clerk of the Supreme Court of the State of Ohio.
11. Certificate of lodgment.

The above and foregoing being all those parts of the transcript of the record herein preceding the printed record in the Supreme Court of Ohio. In addition thereto, plaintiff in error asks that the following parts of the printed record of this cause in the Supreme Court of the State of Ohio be printed; reference being hereinafter made to the pages of said printed record as the same appears in the record filed in this Court.

12. Petition in error to Supreme Court of Ohio, pp. 1 to 3.
13. Petition in error to the Circuit Court of Lucas County, Ohio, pp. 3 to 5.
14. Docket entries, Lucas County Circuit Court, p. 5.
15. Journal entries, Lucas County Circuit Court, pp. 5 to 6.
16. Petition in Lucas County Common Pleas Court, pp. 7 to 11.

242 17. Amended answer in Lucas County Common Pleas Court, pp. 11 to 13, excepting sub-section "D" thereof, appearing on p. 13.

18. Reply to amended answer in Lucas County Common Pleas Court, p. 14.

19. Motion for new trial, Lucas County Common Pleas Court, pp. 14 to 15.

20. Docket entries, Lucas County Common Pleas Court, pp. 15 to 18.

21. Journal entries, Lucas County Common Pleas Court, pp. 18 to 21.

22. Bill of exceptions, Lucas County Common Pleas Court, commencement on p. 21.

Plaintiff's Evidence.

23. Evidence of Otto E. Slavin, pp. 27 to 61.

24. Evidence of Chester Mack, direct examination from commencement on p. 70 to and including Q. "How, as switchman?" A. "Yes sir," page 70.

25. Evidence of same witness, cross examination, from Q. "When you used to bring those cars in from Copeland with a bum engine did you often run in onto track No. 4?", on p. 78 to and including Q. "Onto that track?" A. "Yes sir".

26. Evidence of James Spangler, direct examination, p. 81, from first question on p. 81 to and including Q. "In the yards here in Toledo?" A. "Yes sir," on same page.

27. Evidence of same witness, cross examination, from commencement on p. 82 to and including Q. "It appeared to you that those tracks were closer together than any other tracks in the yard?" A. "Yes sir," on page 83.

28. Evidence of witness, E. M. Skiver, direct examination, from commencement on p. 98 to Q. "Were you acquainted with the yards here in South Street?" A. "Yes sir," on same page.

29. Evidence of same witness, on cross examination, from commencement on p. 101 to and including Q. "You had known Slavin then to have worked there for about four years under those conditions?" A. "Yes sir," p. 102.

30. Evidence of witness, Frank Penny, from commencement p. 103 to and including Q. "On the 19th day of August last were you a switchman there?" A. "Yes sir," p. 104.

31. Evidence of same witness, entire cross examination, pp. 106 and 107.

32. Evidence of witness, William S. Teal, from commencement on p. 107 to and including Q. "When?" A. "In August last year I was car inspector," on p. 108.

33. Evidence of same witness, on cross examination, pp. 111 and 112.

243 34. Evidence of witness, Elwood Squires, from commencement on p. 120 to and including Q. "Your office, as conductor, required you to be around the yards on South Street?" A. "Yes sir," p. 120.

35. Cross examination of same witness on pp. 121 and 122.

Defendant's Evidence.

36. Evidence of witness, A. W. Sheahen, pp. 135 to 140.
37. Bill of exceptions, from sentence: "Thereupon the defendant rested," p. 167 to "And the defendant, by its counsel, requested the Court in writing to give to the jury in his charge the following propositions of law, to-wit: on page 168, both inclusive.
38. Defendant's instruction No. 1, p. 168.
39. Defendant's instruction No. 3, p. 169.
40. Defendant's instructions, Nos. 10 to 15, both inclusive, pp. 172 to 174.
41. Charge of the Court and remainder of the bill of exceptions, pp. 176 to 192.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY,
By CLARENCE BROWN,
CHARLES A. SCHMETTAU,
Its Attorneys.

TOLEDO, OHIO, May 2, 1913.

We hereby acknowledge service upon us of a copy of the foregoing statement.

C. H. MASTERS AND
KOHN, NORTHUP & MORGAN,
Attorneys for Defendant in Error.

244 [Endorsed:] 1062/23,637. In the Supreme Court of the United States. Toledo, St. Louis and Western Railroad Company, Plaintiff in Error, vs. Otto E. Slavin, Defendant in Error. Statement of errors relied upon and of parts of record to be printed. Clarence Brown, Gen'l Solicitor; Chas. A. Schmettau, Ass't Gen'l Solicitor; —— ——, Local Attorney.

245 [Endorsed:] File No. 23,637. Supreme Court U. S., October term, 1912. Term No. 1062. Toledo, St. Louis & Western R. R. Co., Pl'ff in Error, vs. Otto E. Slavin. Specification of errors relied upon by plaintiff in error and designation of parts of record to be printed, with proof of service of same. Filed May 5, 1913.

Endorsed on cover: File No. 23,637. Ohio Supreme Court. Term No. 147. Toledo, St. Louis & Western Railroad Company, plaintiff in error, vs. Otto E. Slavin. Filed April 17th, 1913. File No. 23,637.

IN THE

Supreme Court of the United States.

October Term, 1914.
No. 147.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY,

Plaintiff in Error,

vs.

OTTO E. SLAVIN,

Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

CLARENCE BROWN,
CHARLES A. SCHMETTAU,
Attorneys for Plaintiff in Error

THE TOLEDO BRIEF & RECORD COMPANY,
PRINTERS.

IN THE

Supreme Court of the United States.

October Term, 1914.
No. 147.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY,

Plaintiff in Error,

vs.

OTTO E. SLAVIN,

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In Error to the Supreme Court of the State of Ohio.

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CLARENCE BROWN,
CHARLES A. SCHMETTAU,
Attorneys for Plaintiff in Error

INDEX

IN THE

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OTTO E. SLAVIN,

Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

This was an action originally brought in the Common Pleas Court of Lucas County, Ohio, by Otto E. Slavin against Toledo, St. Louis and Western Railroad Company for fifteen thousand dollars ($15,000.00) damages for personal injuries

alleged to have been sustained by him whilst in the employ of the Railroad Company as a switchman at Toledo, Ohio, on August 19th, 1910.

The petition alleged that at the time of the accident Slavin had been employed as a switchman in the Railroad Company's yards at Toledo aforesaid, for a period of six (6) days.

That the Railroad Company had in its said yards two tracks, running north and south, known respectively as the "fourth" and "fifth" tracks, which were so close together that, at the point where Slavin was injured, the west rail of the fifth track was but six (6) feet distant from the east rail of the fourth track.

That at 9:00 p. m. on August 19th, 1910, while riding on the side of a gondola car, which was being moved north on the fourth track, Slavin was struck by and collided with a car standing on the fifth track, thrown to the ground and rolled between the two cars, breaking some of his ribs and inflicting other bruises, lacerations and internal injuries. It was averred that Slavin had no notice of the presence of the car on the fifth track until he had gotten within a car length of it and had not sufficient time to leave his position on the side of the gondola and escape injury. Also, that it was customary, to the knowledge of the Railroad Company, for switchmen, in the performance of their duties, to ride on the side of cars as Slavin was doing. The Railroad Company was charged with negligence in the following respects:

1. Permitting said tracks to remain in such close proximity to each other.

2. Permitting the use of said tracks at the same time in the transportation and locating of cars.

3. Placing cars of "such width" on the fifth track and permitting them to remain there whilst the fourth track was in use.

4 Failing and omitting to notify Slavin of the presence of the cars on said fifth track. (Petition, Rec. 4-6.)

To this petition an answer was filed by the Railroad Company, admitting its corporate capacity and ownership of the yards at Toledo and its employment of Slavin, but denying negligence and denying all of the material allegations of the petition, excepting as above stated.

The answer further charged Slavin with contributory negligence, averring in substance that he knew the location of the fourth and fifth tracks and the distance between them, and that, with such knowledge, he voluntarily placed himself in a position of danger on the side of a moving car, and failed to keep a lookout for cars on the adjacent, or fifth, track. (Answer, Rec. pp. 6-7.)

A reply was filed, denying the allegations of new matter in the answer and, upon the issues so made, the case went to trial. (Reply, Rec. 8.)

The evidence showed that whilst Slavin alleged in his petition that he had been employed by the Railroad Company for only six (6) days prior to the accident, he had, in fact, worked for the company in its Toledo yards as fireman and engineer from October 3rd, 1903, to January 7th, 1910. On the latter date he left the service, but returned and was re-employed, this time as a switchman, on August 13th, 1910. (Rec. 23.)

Tracks four and five were laid many years before Slavin first entered the company's service and were in the same relative location each to the other, and the same distance apart during the entire time he worked in the Toledo yards as engineer and fireman from 1903 to 1910 and when he again entered the service as switchman on August 13th, 1910. (Rec. 35, 36, 37, 38, 40, 41.)

One of the regular engines working in these yards was known by the men as the "bum engine." It was part of the work of this particular engine to handle cars between the connection and delivery tracks of the Terminal Railroad Company at Copeland, three miles south of the Railroad Company's

Toledo yards, and these yards. (Rec. 15, 25.) The same engine also, each night, pulled out a freight train, known as No. 45, which was always made up on tracks four and five and switched out of these tracks by the "bum engine." (Rec. 25.) During the seven years of his employment as fireman and engineer, Slavin had often run this engine and had done work with it on tracks four and five. In the course of this work, it was part of his duties to take signals from switchmen, and, in order to do so, he watched them at their work. (Rec. 24, 25.) He ran this particular engine "on and off" for six (6) years. (Rec. 24.) When he re-entered the Railroad Company's service as switchman, on August 13th, 1910, he went to work with the same engine and was working with it when the accident occurred. (Rec. 25.) Even when he was not on this particular engine, Slavin, as fireman and engineer, frequently worked on tracks four and five (Rec. 23, 24).

On the evening of August 19th, 1910, Slavin, working as switchman with the "bum engine," helped in taking train 45 out of these very tracks, four and five (Rec. 25). Later, the engine went to Copeland to deliver cars there and returned with a cut of loaded cars, delivered to the Railroad Company by the Hocking Valley Railway Company, by way of the Terminal Railroad. Slavin stayed at Michigan Central Junction, a point between the yards and Copeland, in order to flag. (Rec. 29.) The engine returned at about 9 p. m. with the cars from the Hocking Valley and, as it passed the point where Slavin was flagging, he climbed onto the side of one of the cars, a gondola, and rode to the yards. As the train pulled in on track No. 4, Slavin rode with one foot in the stirrup at the end of the gondola, facing the side of the car, his body projecting beyond the side of the car towards track No. 5 (Rec. 28.) Some cars were standing on track No. 5, one of which Slavin passed in safety, but as he passed the next one, "something on the side of the car" struck him and he was thrown to the ground. (Rec. 28.) Slavin knew there were some cars on track No. 5

but did not notice them when he went down track No. 4 on a previous occasion that evening. (Rec. 29.) He was hanging on the side of the car in the position switchmen customarily assumed and, during the years he worked as engineer and fireman, had seen switchmen riding in the same way on cars on tracks four and five. (Rec. 33.)

On cross examination of a witness for Slavin, William S. Neal, a car inspector, the cars in the train on which Slavin was riding were identified by number and initials and proof was made that they were all loaded. (Rec. 39.) In the testimony of the witness, Sheahen, for the defense, the points of origin and destination of each of these cars were given and it appeared, without contradiction, that, with a few exceptions, they were moving in interstate traffic. (Rec. 41-43.)

The evidence thus clearly established the following facts:

(*a*) That the railroad company was a common carrier engaged in interstate commerce and that, at the time of the accident, Slavin was employed in interstate commerce.

(*b*) That no change had been made in the location of tracks Nos. 4 and 5 during the period of Slavin's service, approximately seven years, and that during that entire period the tracks had been as close to each other as they were at the time of the accident.

(*c*) That Slavin, during his seven years service, had had ample opportunity to observe this so-called "defect," both by working on and between these tracks under conditions substantially the same as those existing at the time of the accident and by observing others working between them.

No attempt was made to prove any other allegation of negligence than that based upon the alleged lack of space between tracks 4 and 5. No proof was made that the car on track 5 was of unusual or extraordinary width and, while the evidence tended to show that Slavin was not expressly notified of the presence of that car on track 5, it was not claimed that such notice was usually given and no proof was introduced

of any extraordinary circumstances creating an unusual danger, which might give rise to a duty on the part of the Railroad Company to give notice.

At the close of all the evidence, the Railroad Company, relying on the Federal Act of 1908, therefore moved for the direction of a verdict but its motion was overruled and exceptions taken. (Rec., 45.)

To further raise the questions growing out of the application of the Federal Act and its construction, the Railroad Company thereupon requested the court to charge the jury, both that the Federal Act exclusively governed the rights and liabilities of the parties to the case and that under the Federal Act assumption of the risk by Slavin, was a complete defense to the action. To this end the following instructions were requested:

> "You are instructed that as the uncontradicted evidence in this case shows that the defendant at the time plaintiff received his injuries was a common carrier engaged in interstate commerce between the several states and that the plaintiff at the time he received his injuries was employed by the defendant in such commerce, the relations between the plaintiff and defendant were exclusively governed by the Act of Congress approved April 22, 1908, and entitled: 'An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases.'
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> "That act, so far as applicable to the case at bar, provides as follows:
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> "'That every common carrier by railroad while engaging in commerce between any of the several States or Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.'

"'That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employe, * * * the fact that the employe may have been guilty of contributory negligence shall not be a bar to recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; * * * .'

"You are instructed that the Act of Congress, approved April 22, 1908, and entitled: 'An Act relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases,' and under which the plaintiff must recover, if he recover at all, does not bar the defense that the plaintiff assumed the risk of the matters and things in regard to which in his petition herein he alleges that the defendant was negligent. If, therefore, you find from the evidence that at the time of his injury, the plaintiff knew, or in the exercise of reasonable care should have known, that tracks 4 and 5 were so close together that in riding upon the south side of a car moving on track 4, he could not safely pass cars standing upon track 5, and that there were, or were likely to be, cars standing upon track 5 at the time he was riding on the side of said car on track 4, then you are instructed that the plaintiff is not entitled to recover and your verdict herein must be for the defendant." (Rec., 46, 47.)

The court, however, took the view that the Federal Act was inapplicable, refused these instructions and charged the jury, under the State Employers' Liability Acts, on the subject of the defense of assumed risk, as follows:

"The legislature has regulated by recent acts, this branch of the law so that an employe of a railroad company who is injured as the result of a defect shall not be deemed to have assumed the risk in connection therewith, although continuing in the employ of the company after knowledge of the defect. The distance between the tracks, the location of tracks four and five, if those tracks were at such a distance apart as was not sufficient to enable the plaintiff safely to perform

his duties, was a defect within the meaning of this act. A defect means a blemish or imperfection. The yard of the defendant and the tracks laid in the yards are to be considered together as one structure and you will therefore consider that the plaintiff did not assume the risk arising from the performance of his duty on these tracks, if properly done, if these tracks were so close together as to constitute a danger." (Rec., 51, 52.)

Proper exceptions were taken to the refusal of the court to give the above requested instructions and also to its charge (Rec., 55). Under Ohio General Code, Sec. 11561 the general exception to the court's charge ran to each and every portion of the charge.

> "A general exception taken to a charge of a court to a jury shall apply to all errors of law which exist in such charge that are material and prejudicial to the substantial rights of the party excepting."

But, in addition to this a special exception was entered to the refusal of the court to apply the Federal Employers' Liability Act to the case. (Rec., 55.)

Upon this charge, the case was submitted to the jury, which rendered a verdict for Slavin in the sum of three thousand dollars ($3000.00). (Rec. 9.) Motion for a new trial was filed and overruled and judgment entered for $2500 on the plaintiff remitting $500.00 of the verdict. (Rec., 9.) A petition in error was duly filed by the Railroad Company in the Circuit Court, and, upon hearing, the Circuit Court reversed the judgment of the Common Pleas Court, upon the ground that that court erred in holding that the case was governed by the State Employers' Liability Acts and not by the Federal Act of 1908. The court then proceeded to review the evidence and finding that Slavin, as an experienced railroad man, must, under the evidence, be charged with notice of the location of the tracks and the lack of space between them, and that his knowledge of the conditions complained

of was "clearly shown by his own evidence," entered judgment for the Railroad Company, holding that, under the Act of April 22nd, 1908,

> "assumed risk, except in cases where there is a violation of a statute relative to the safety of appliances, etc., used by Railroad Companies, remains a defense available to the Railroad Company in an action of this character."
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> (Opinion of Circuit Court, Rec., 63-65.)

To this judgment Slavin filed his petition in error in the Supreme Court of Ohio. (Rec., 1-2.)

The Supreme Court reversed the judgment of the Circuit Court and affirmed that of the Common Pleas Court, rendering no opinion (Rec., 72), but certifying that—

> "Upon the argument of the foregoing cause in this court, counsel for the defendant in error, Toledo, St. Louis and Western Railroad Company, contended that the judgment of the Court of Common Pleas in said cause was in violation of the Act of Congress of April 22nd, 1908, entitled: 'An Act relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases,' and said contention was overruled by the judgment of this court." (Rec. 77.)

Upon a petition for a writ of error to this court being filed, the Supreme Court of Ohio allowed the writ. (Rec., 57-69.)

II.

SPECIFICATION OF ERRORS RELIED UPON.

(1) The Supreme Court of Ohio erred in reversing the judgment of the Circuit Court of Lucas County, Ohio, and in affirming the judgment of the Common Pleas Court of Lucas County, Ohio, thereby depriving this plaintiff in error of rights, privileges and immunities secured to it by the Act of Congress of April 22nd, 1908, entitled: "An Act relating

to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," to-wit, in this case: the defense that the defendant in error had assumed the risk of the defects complained of in his petition.

(2) The Supreme Court of Ohio erred in reversing the judgment of the Circuit Court of Lucas County, Ohio, by which said judgment said Circuit Court held that this case was governed by the Act of Congress passed April 22nd, 1908, and entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," and held that this plaintiff in error had, under said Act of Congress, established a complete defense to this action, which defense would not have been available to this plaintiff in error, if this case was, as held by the Common Pleas Court of Lucas County, aforesaid, and by the Supreme Court, in affirming the judgment of said Common Pleas Court, governed by sections 6245 and 9017 of the General Code of the State of Ohio.

(3) The Supreme Court of Ohio erred in reversing the judgment of the Circuit Court of Lucas County, Ohio, whereby said Circuit Court held that the said sections 6245 and 9017 of the General Code of the State of Ohio were superseded by the Act of Congress of April 22nd, 1908, entitled "An Act relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases."

(4) The Supreme Court of Ohio erred in affirming the judgment of the Court of Common Pleas of Lucas County, Ohio whereby said Court of Common Pleas held that this case was governed by sections 6245 and 9017 of the General Code of the State of Ohio, and not by the Act of Congress of April 22nd, 1908, entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," and that the said Statutes of the State of Ohio were not in conflict with, and were not superseded by, said Act of Congress.

(5) The Supreme Court of Ohio erred in affirming the judgment of the Common Pleas Court of Lucas County, Ohio, thereby affirming the action of said court in refusing to give to the jury the following instructions requested by the plaintiff in error, to-wit:

> "You are instructed that as the uncontradicted evidence in this case shows that the defendant at the time the plaintiff received his injuries was a common carrier engaged in interstate commerce between the several states and that the plaintiff at the time he received his injuries was employed by the defendant in such commerce, the relations between the plaintiff and defendant were exclusively governed by the Act of Congress approved April 22, 1908, and entitled: 'An Act relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases.'
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> "That act, so far as applicable to the case at bar, provides as follows:
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> "'That every common carrier by railroad, while engaging in commerce between any of the several States or Territories * * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, or other equipment.'
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> "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employe * * * the fact that the employe may have been guilty of contributory negligence shall not be a bar to recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: * * * ."

notwithstanding that it was proved in said case, without contradiction, that at the time the defendant in error received his alleged injuries he was employed in interstate commerce

by the plaintiff in error which was at the time, a common carrier by railroad engaged in interstate commerce.

(6) The Supreme Court of Ohio erred in affirming the judgment of the Court of Common Pleas of Lucas County, Ohio, thereby affirming the action of said Court in refusing to give to the jury the following instruction requested by this plaintiff in error, to-wit:

> "You are instructed that the act of Congress approved April 22, 1908, and entitled: 'An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases,' and under which the plaintiff must recover, if he recover at all, does not bar the defense that the plaintiff assumed the risk of the matters and things in regard to which in his petition herein he alleges that the defendant was negligent. If, therefore, you find from the evidence that at the time of his injury, the plaintiff knew, or in the exercise of reasonable care should have known, that tracks 4 and 5 were so close together that in riding upon the south side of a car moving on track 4, he could not safely pass cars standing upon track 5, and that there were, or were likely to be, cars standing upon track 5 at the time he was riding on the side of said car on track 4, then you are instructed that the plaintiff is not entitled to recover and your verdict herein must be for the defendant."

notwithstanding that it was proved in this case, without contradiction, that at the time the defendant in error received his alleged injuries he was employed in interstate commerce by the plaintiff in error which was at the time a common carrier by railroad engaged in interstate commerce.

(7) The Supreme Court of Ohio erred in affirming the judgment of the Court of Common Pleas of Lucas County, Ohio, thereby affirming the action of said Court in charging the jury as follows:

> "The Legislature has regulated by recent acts this branch of the law so that an employe of a railroad company who is injured as the result of a defect shall not be deemed to have assumed the risk in connection therewith, although continuing in the employ of the company after knowledge of the defect. The distance

between the tracks, the location of tracks four and five, if those tracks were at such a distance apart as was not sufficient to enable the plaintiff safely to perform his duties, was a defect within the meaning of this act. A defect means a blemish or imperfection.

The yard of the defendant and the tracks laid in the yards are to be considered together as one structure and you will therefore consider that the plaintiff did not assume the risk arising from the performance of his duty on these tracks, if properly done, if these tracks were so close together as to constitute a danger."

notwithstanding that it was proved in said case, without contradiction, that at the time the defendant in error received his alleged injuries he was employed in interstate commerce by the plaintiff in error, which was, at the time, a common carrier by railroad engaged in interstate commerce and that the rights and liabilities of the parties to this action were therefore exclusively defined by the Act of Congress of April 22nd, 1908, entitled "An Act relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," and not by the Statutes of the State of Ohio as charged by the Court, and that, under said Act of Congress, the plaintiff in error was entitled in this case to avail itself of the defense of assumption of the risk.

(8) The Supreme Court of Ohio erred in affirming the judgment of the Court of Common Pleas of Lucas County, Ohio, thereby affirming the action of said Court in overruling the motion of the plaintiff in error at the close of all the evidence for the direction of a verdict in its favor, although, under the Act of Congress of April 22nd, 1908, entitled: "An Act relating to the liability of Common Carriers by Railroad to their Employes in Certain Cases," the plaintiff in error, by reason of the uncontradicted proof showing knowledge on the part of the defendant in error of the defective conditions complained of in his petition and his assumption of the risk thereof, was, as a matter of law, entitled to the direction of such a verdict.

III.

ARGUMENT.

(*a*) As at the trial of this case, it appeared by uncontradicted proof that, at the time of the accident, the Railroad Company was a common carrier by railroad, engaged in interstate commerce, and Slavin was actually assisting in the work of switching cars containing interstate shipments and moving under interstate billing, Slavin's action clearly lay under the Federal Employers' Liability Act of April 22, 1908, and the Common Pleas Court, whose judgment was affirmed by the Supreme Court, erred in refusing to apply the provisions of that act to the case and in charging the jury that, under the State Employers' Liability Act, Section 6245 of the General Code of Ohio, assumed risk on the part of Slavin was not a defense to the action.

As heretofore shown in this brief, it appeared during the progress of the trial in the Common Pleas Court by uncontradicted proof, admitted without objection or exception by the plaintiff in that court, that, at the time of the accident, the Railroad Company owned and operated a line of railroad, extending from Toledo, Ohio, through the states of Ohio, Indiana, and Illinois to East St. Louis, Illinois, and that the majority of the cars attached to the yard engine and which were being switched by the crew, of which Slavin was a member at the time he received his injuries, were moving on interstate billing and were loaded with interstate shipments. (Rec., 39, 41-43.)

There is, therefore, no question but that, at the time of the accident, the Railroad Company was engaged in interstate commerce and Slavin was employed by it in such commerce.

Plaintiff in error, therefore, took the position that the case was governed by the Federal Employers' Liability Act of 1908; that, by that act, all state legislation on the same subject had been superseded; that Slavin's cause of action, if any he had, grew out of and in all its incidents was controlled by the Federal Act and that, by the terms of that act, the defense of assumed risk was available to the Railroad Company. In other words, that as said in *Cound vs. Railroad Company*, 173 Fed., 527, 531:

> "When the act is analyzed, it becomes apparent that it was the purpose of congress to confer rights and benefits upon the injured employe which were denied him by the common law; and hence the existence of the common law right of action on the part of the injured employe cannot in reason be claimed in the presence of this act of Congress. *Indeed, the act is the law and the only law under which suits like the present one may be brought.* It is the law of the case by which the rights of the employe and the liability of the carrier are measured."

Slavin's counsel, however, while admitting that the Federal Act applied to the case, took the position that, inasmuch as Congress, by the act of April 22, 1908, had not, in so many words, declared that, in cases other than those mentioned in Section 4 of that Act—*i. e.*, cases in which the carrier was guilty of a violation of a statute enacted for the safety of employes—the defense of assumed risk should remain to the carrier, Congress had not, by that act, attempted to regulate the doctrine of assumed risk in its entirety, and it was still open to the states to legislate on the subject of the application of that doctrine in all cases other than those expressly mentioned in the Federal Act. Their position was based upon the long line of cases holding that where Congress and the State Legislatures have concurrent jurisdiction over a certain field or subject, that "field" or "subject" is, in the absence of Federal legislation left open to

legislation by the States, and that, if in such cases Congress has acted, but has not by its legislation covered the entire field or exhausted the subject, legislation by the States covering that portion of the field or subject left untouched by Congress, is not superseded. Their error lay in regarding the doctrine of "assumed risk" as a separate field or subject instead of a mere incident of the general subject of the employer's liability for injuries caused to his employe through negligence which is the "field" which the Act of 1908 was intended to, and has since been held to cover. They also overlooked the line of cases headed by *Houston vs. Moore*, 5 Wheat., 1, and *Prigg vs. Pennsylvania*, 16 Peters, 536, which establish the rule that when Congress has exercised a power over a particular subject, given to it by the Constitution, its will upon the whole subject is as clearly established by what it has not declared as by what it has expressed. They, therefore, contended that Sections 9017 and 6245 of the General Code of Ohio, depriving the employer, in cases of this character of the defense of assumed risk, were still in force and were not superseded by the Federal Act of 1908, and that, under those sections, Slavin could not be charged with the assumption of the risks attaching to the alleged dangerous proximity of the tracks, to which his injury was attributed, even admitting that the defense showed that he had knowledge, either actual or implied, thereof.

Sections 9017 and 6245 of the State Code, which counsel for Slavin relied upon are, so far as applicable to this case, as follows:

> "SEC. 9017. Every railroad company operating a railroad which in whole or part is within this state, shall be liable for all damages sustained by any of its employes by reason of personal injury or death of such employe.
>
> "1. When such injury or death is caused by a defect in any * * * * rail, track, machinery or appliance required by such company to be used by its

employes in and about the business of their employment, if such defect could have been discovered by reasonable or proper care, test or inspection. Proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company. An employe of such railroad company, who is injured or killed as a result of such a defect shall not be deemed to have assumed the risk occasioned thereby, although continuing in the employment of the company after knowledge of the defect, nor shall continuance in employment after such knowledge by an employe be deemed an act of contributory negligence.

"SEC. 6245. That in any such action, when it shall appear that the injury or death was caused in whole or in part by any of the following, to-wit: * * * any defective or unsafe condition in the ways, works, boats, wharves, plant, machinery, appliances or tools, except simple tools, in any way connected with or in any way used in the business of the employer, the fact that such employe continued in said employment with knowledge of such negligent omission or want of care or such defective or unsafe condition shall not be a defense unless by the terms of his employment it was expressly made the duty of such employe to report such * * * * defective or unsafe condition to the employer and the evidence discloses that such employe failed to so report, and that the employer was not otherwise possessed of knowledge of such negligent, unsafe or defective condition."

The Common Pleas Court evidently adopted this theory for, as we have shown, it refused the instructions requested by the Railroad Company on the subject of assumed risk, (Rec., 46, 47), and, on the contrary, charged the jury that this branch of the law had been recently so regulated by the State Legislature that Slavin, even if he knew that these tracks were so close together as to constitute a danger, did not thereby assume the risk arising from the performance of his duty upon them. (Rec., 51, 52.)

The Circuit Court reversed the judgment of the Common Pleas Court on the express ground that the State Acts

on the subject of the Employers' Liability were completely superseded in this case by the Federal Act and that, upon his own uncontradicted evidence, Slavin must be charged with knowledge of the alleged defective condition of the tracks and with the assumption of the risk of the dangers resulting therefrom.

In the Circuit Court, the same position was taken by Slavin's counsel as in the Common Pleas Court.

In the Supreme Court of Ohio, a brief was filed by Mr. Orville Brumback, an attorney of Toledo, as *amicus curiae*, in which the additional point was made that, even if the Federal Act was exclusive and superseded State Legislation, yet Sections 1, 4 and 5 of the Federal Act, read together, must be construed to abolish the defense of assumed risk in its entirety and not only in the cases specifically mentioned in Section 4. This contention was based upon the opinion of Judge McCall in the case of *Wright vs. Yazoo, etc., R. R. Co.*, 197 Fed., 94.

When this case was tried in the Common Pleas and Circuit Courts, the questions so raised, had not been directly decided in any reported case in this court. Counsel for the Railroad Company, in support of their contention, relied on *Mondou vs. Railroad Co.*, 223 U. S., 1, and upon the decisions of the Federal Circuit Courts in *Fulgham vs. Railroad Company*, 167 Fed., 660; *Cound vs. Railroad Company*, 173 Fed., 527; *Dewberry vs. Railroad Company*, 175 Fed., 307; *Smith vs. Railroad Company*, 175 Fed., 506; *Whittaker vs. Railroad Company*, 176 Fed., 130, as establishing a construction and application of the Federal Act which excluded any theory that its provisions could be, in any respect, modified, or added to, by State Legislation.

Before this case was heard in the Supreme Court of Ohio, the case of *Michigan Central R. R. Co. vs. Vreeland*, 227 U. S., 59, was decided and reported by this court and

was cited to the Ohio Court as conclusive authority that the Federal Act was exclusive and could not be "pieced out" by resorting to State Statutes, but as the Supreme Court of Ohio rendered no opinion, we are unfortunately left without any explanation of the grounds upon which it distinguished that case in arriving at its final conclusion.

But the fact remains, as shown by the certificate which the court embodied in its order reversing the judgment of the Circuit Court that our contention that the Court of Common Pleas had erred in failing to apply the Federal Statute to this case was by it overruled. (Rec., 77.)

The only questions raised in this case have now been finally determined by this court in the case of *Seaboard Air Line Co. vs. Horton*, 233 U. S., 492 (Adv. Sheets Vol. 233, No. 3, May 20, 1914). In that case, it was settled that Section 4 of the Federal Act, in eliminating the defense of assumed risk in the specific cases, mentioned therein, plainly evidences the legislative intent of Congress that in all other cases such assumption shall have its former effect as a complete bar to the action. It was also held that the trial court erred in that case in adopting, in its charge the rules as to assumed risk laid down by the Statute of South Carolina instead of the rule expressed in the Federal Act.

That case is, therefore, decisive of the case at bar in which the Supreme Court of Ohio reversed the judgment of the Circuit Court, based solely upon the Federal Statute, and affirmed the judgment of the Common Pleas Court applying to this case the rules as to assumed risk laid down by Sec. 6245 of the General Code of Ohio.

(*b*) **The evidence clearly showed that Slavin must be charged with actual or constructive notice of the defects complained of and assumed the risk of those defects.**

The Circuit Court, in its opinion, found that

> "the plaintiff (Slavin) was an experienced railroad man, who had worked several years in the yards where he was injured. He knew the location of the tracks and method of handling business in these yards quite as well as the Railroad Company did. This is shown by his own evidence. * * * * Mr. Slavin, being thoroughly acquainted with the conditions existing in this railroad yard must be held to have assumed the risks incident to his employment as switchman there. It is our opinion that, even giving the evidence the most favorable construction possible for Mr. Slavin, there can be no recovery in view of the Federal Act for the injury he has sustained." (Rec., 64.)

In our statement of the case, we have very fully gone into the evidence upon which this finding of the Circuit Court was based. Briefly stated, it was to the effect that Slavin had been employed by the Railroad Company in its yards as fireman and engineer for approximately seven years before he went to work as switchman and during that entire period the tracks between which he was injured, were maintained at the same distance apart as at the time of his injury. (Rec., 23, 35, 36, 37, 38, 40, 41.) During this lengthy term of service, he had worked on these tracks almost daily. (Rec., 23, 24, 25.)

His opportunities for knowing the construction and location of these tracks and the dangers incident to working between them were ample, for, when working as engineer and fireman, it was his duty to take signals from the switchmen and, in watching them at their work, he can not have failed to notice the lack of space between these tracks. (Rec., 24, 25.)

The danger was patent and certainly obvious to an experienced railroad man who, for seven years, had worked daily over these very tracks.

As said by this court in *Randall vs. B. & O. R. R. Co.*, 109 U. S., 478, 482.

> "A railroad yard where trains are made up necessarily has a great number of tracks and switches close to each other and anyone who enters the service of a railroad corporation in any work connected with the making up or moving of trains assumes the risk of that condition of things."

Under the doctrine of that case and the later cases of *Tuttle vs. Railroad Company*, 122 U. S., 189; *Southern Pacific R. R. Co. vs. Seley*, 152 U. S., 145; *Choctaw, etc., R. R. Co. vs. McDade*, 191 U. S., 64, and *Texas, etc., R. R. Co vs. Archibald*, 170 U. S,, 65, Slavin clearly assumed the risk of a condition so obvious and patent. Moreover, there was absolutely no showing made in behalf of Slavin that these tracks were any closer together than was usual in the yards of this particular company or of other railroads.

The finding of the Circuit Court was, therefore, fully warranted by the evidence. Even if this court should not accept that finding as conclusive, the uncontradicted facts, appearing in the record, will justify no other finding than that Slavin must have known of the alleged dangerous condition and assumed the risk thereof.

For the reasons stated above, we respectfully submit that the judgment of the Supreme Court of Ohio should be reversed.

CLARENCE BROWN,
CHARLES A. SCHMETTAU.
Attorneys for Plaintiff in Error.

TOLEDO, OHIO, SEPTEMBER, 1914.

IN THE

Supreme Court of the United States

October Term, 1914. No. 147.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY,

Plaintiff in Error,

vs.

OTTO E. SLAVIN,

Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

REPLY BRIEF OF PLAINTIFF IN ERROR.

CLARENCE BROWN,
CHARLES A. SCHMETTAU,
Attorneys for Defendant in Error.

The Toledo Brief & Record Company,
Printers.

IN THE

Supreme Court of the United States

October Term, 1914. No. 147.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY,

Plaintiff in Error,

vs.

OTTO E. SLAVIN,

Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The brief filed in behalf of defendant in error by special leave of court, is directed solely to the question of the jurisdiction of this court to review the judgment of the Supreme Court of Ohio.

The defendant in error's position, stated concisely, is that, because the facts which brought the case within the Federal Statute were not pleaded, the evidence offered to prove them was inadmissible and cannot have been considered

by the Supreme Court of the State of Ohio. That it must therefore be presumed that the judgment of that court was not based upon a construction of the Federal Employers' Liability Act of 1908.

Counsel go outside of the record in stating that two questions were presented for the consideration of the Ohio Supreme Court—the first that the testimony in relation to the parties being engaged in interstate commerce was not admissible under the pleadings; and the second, whether the Federal Employers' Liability Act of 1908 applied. There is nothing in the record to show that the first question was presented, nor is it a fact that it was presented. The evidence which brought the case under the Federal Statute consisted of the evidence of Car Inspector Teall and Agent Sheahen, identifying the cars which were being handled by the train with which Slavin was working at the time of his injury, the point of origin and destination of these cars, and the facts showing that the plaintiff in error was a common carrier engaged in interstate commerce at the time of the accident. All of this evidence was admitted without any objection on the part of the defendant in error. (Rec., 39, 41-43.)

It was not until certain car lists, Exhibits 3 and 4, which were cumulative evidence only, were offered, that plaintiff in error objected to evidence of this character. (Rec., 45.)

The objection was not specific and no exception was taken. There was, therefore, no question before the Supreme Court, as to the admissibility of this evidence.

In Ohio, error in the introduction of evidence is waived by failure to take proper objections and exceptions.

Geauga Iron Co. vs. Street, 19 Ohio, 299.
Inglebright vs. Hammond, 19 Ohio, 337.
Templeton vs. Kraner, et al., 24 O. S., 554.

Counsel rely upon the case of *Erie R. R. Co. vs. Welsh*, 89 O. S., 81. That case, we admit, is decisive of the case at

bar, but we call the court's attention to a portion of the opinion which counsel for plaintiff in error have not seen fit to quote—

> "It follows, therefore, that if the plaintiff in error desired to avail itself of the benefit of the federal act, it should have pleaded such facts as would bring the transaction within the operation of that act. It is, of course, not necessary that it should plead the terms and provisions of the federal act. It is only necessary that it aver the facts that show that the federal act, and not the state law, applies. This tenders an issue of fact, which if denied by the reply must be determined as any other issue of fact in the case. *If the defendant below should fail to plead facts that would take the transaction out of the law of the forum and bring it within the operation of the federal law, then it could not be permitted over the objection of plaintiff to introduce any evidence in proof of such facts, because no such issue is presented by the pleadings. If, however, the defendant does not plead facts that, if proven, would bring the transaction within the operation of federal law, yet if the evidence introduced by plaintiff in support of the allegations of his petition shows that he was engaged in interstate commerce, or if the defendant, without objection on the part of plaintiff, introduced evidence of such facts, then it is the duty of the court to charge the provisions of the federal act instead of the provisions of the state statutes,* unless there should be a conflict of evidence, in which event an amendment should be permitted and the issue of fact submitted to the jury with proper instructions to apply the state or federal law as the jury may determine the fact to be."

It is unnecessary to cite other authority, for, clearly, in the case at bar, as in the case cited, the evidence introduced by the defendant, without objection on the part of plaintiff, showed that the plaintiff and the defendant were both engaged in interstate commerce at the time of the accident; so that, under the rule announced by the Supreme Court of Ohio in the Welsh case, it was the duty of the Court of Common

Pleas to charge the provisions of the Federal Act, and any error that may have been committed by that court in permitting the introduction of evidence under the Federal Act was waived by the failure of defendant in error to object to its introduction and to save the question thus raised by proper exceptions.

The record discloses that no attempt was made to controvert the proof on this subject introduced by plaintiff in error, so that no disputed question of fact was presented.

The situation in this case is somewhat analagous to that in the case of *St. Louis and San Francisco Ry. Co. vs. Seale*, 229 U. S., 156, for, as in that case—

> "When the evidence was adduced, it developed that the real case was not controlled by the state statute but by the Federal Statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection grounded on the Federal Statute that the plaintiffs were not entitled to recover on the case proved. We think the objection was entered in due time and that the state courts erred in overruling it."

We therefore respectfully submit that this Honorable Court has full jurisdiction to review the judgment of the Supreme Court of Ohio and that that judgment should be reversed.

CLARENCE BROWN,
CHARLES A. SCHMETTAU,
Attorneys for Defendant in Error.

TOLEDO, OHIO, JANUARY, 1915.

IN THE

Supreme Court of the United States

October Term, 1914. No. 147.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,

Plaintiff in Error,

vs.

OTTO E. SLAVIN,

Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

WALTER G. KIRKBRIDE,
C. H. MASTERS AND
KOHN, NORTHUP, RITTER & MCMAHON,
Attorneys for Defendant in Error.

THE TOLEDO BRIEF & RECORD COMPANY,
PRINTERS.

IN THE

Supreme Court of the United States

October Term, 1914. No. 147.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,

Plaintiff in Error,

vs.

OTTO E. SLAVIN,

Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The statement of facts submitted in the brief of counsel for plaintiff in error is substantially correct, except in the following particulars:

1. It is not set forth in said statement that there was no allegation in any pleading in the case that the railroad company or the defendant in error at the time Slavin was injured was engaged in interstate commerce. No such allega-

tion is contained in the petition, and the answer is a mere admission of certain matters alleged in the petition coupled with an allegation of contributory negligence on the part of Slavin. Of course, no such allegation could appear in the reply, and no effort was made to there plead it.

2. The proof attempted to be made that the railroad company and Slavin were engaged in interstate commerce at the time Slavin received his injuries was objected to by plaintiff (Rec., 45), and the testimony received over the objection.

ARGUMENT ON THE QUESTION OF THE JURISDICTION OF THIS COURT TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF OHIO.

The jurisdiction of this Court to review a judgment of the highest court of a state in certain classes of cases is conferred by Section 237 of the Judiciary Code of 1911, and such power exists only in the cases therein enumerated.

In the trial court the judgment was in favor of Slavin. This judgment was reversed by the Circuit Court and a final judgment entered in favor of the railroad company. The Supreme Court reversed the judgment of the Circuit Court and affirmed that of the Common Pleas Court. No opinion was written by the Supreme Court. Two questions were presented for the consideration of that court: first, was the testimony with relation to the parties being engaged in interstate commerce admissible under the pleadings, and, second, if so did the Federal Employers' Liability Act of 1908 apply? The record affords us no means of determining whether the judgment of the highest court of Ohio was based upon the first or upon the second of these questions. It is true that in the judgment entry in the Supreme Court (Rec., 72) that court certified that:

> "Upon the argument of the foregoing cause in this court, counsel for the defendant in error, Toledo, St. Louis & Western Railway Co., contended that the judgment of the Court of Common Pleas in said cause was in violation of the Act of Congress of April 22, 1908, entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' and said contention was overruled by the judgment of this Court."

This certificate, in our opinion, is not sufficient to warrant this court in entertaining jurisdiction. It does not appear from this certificate that the judgment of the court was based on any construction whatever of the Federal Employers' Liability Act. In fact, the reasonable construction of this clause, in view of the condition of the record, is that the contention made by counsel for the Railroad Company that the judgment was in violation of the Federal Act was overruled *because the question was not raised by proper pleadings alleging that the parties were engaged in interstate commerce at the time Slavin was injured.* Of course, if there is no competent evidence in the case, that the parties were both so engaged, then the judgment would not be in violation of the Federal Act. The court did not certify that it held that the common law doctrine of assumption of risk not in force in cases coming within the Federal Act, but has merely held that the evidence must be restrained to the allegations of the pleadings; that under the evidence properly received the Federal Employers' Liability Act was without application, and that, therefore, the judgment of the Court of Common Pleas could not be said to be in violation of said Act.

The presumption obtains that the law of the forum controls the rights of the parties to litigation, and where in an action in a state court it is claimed that the case is ruled by a federal law the facts bringing the case within the operation of the federal act must be pleaded.

Erie Railroad Co. vs. Welsh, 89 O. S., 81.

In the case last cited, at p. 86 of the opinion it is said:

> "It follows, therefore, that if the plaintiff in error desired to avail itself of the benefit of the federal act it should have pleaded such facts as would bring the transaction within the operation of that act. It is, of course, not necessary that it should plead the terms and provisions of the federal act. It is only necessary that it aver the facts that show that the federal act and not the state law applies. This tenders an issue of fact which if denied by the reply must be determined as any other issue of fact in the case. If the defendant below should fail to plead facts that would take the transaction out of the law of the forum and bring it within the operation of the federal law, *then it could not be permitted over the objection of plaintiff to introduce any evidence in proof of such facts*, because no such issue is presented by the pleadings."

Moreover, the record shows and it is admitted in brief of counsel for plaintiff in error (p. 18), that at the time of the argument of this case in the Supreme Court of Ohio, this court had decided The Second Employers' Liability Cases, 223 U. S., 1, and the case of *Michigan Central Railroad Co. vs. Vreeland*, 227 U. S., 59. In the latter case, it was said (p. 66):

> "By this Act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms supersedes all legislation over the same subject by the states."

In view of the fact that these two cases were admittedly cited to the Supreme Court of Ohio upon the argument of this case (plaintiff in error's brief, p. 18), it would be an unwarranted assumption that the state court intended to hold contrary to those two decisions of this court, but rather it must be assumed that the court decided the case on the question of practice involved. With the decision of the Supreme Court of the state upon a question of local practice this court has no concern. Whether the Supreme Court of Ohio was right in

holding that under the pleadings the evidence relating to the parties being engaged in interstate commerce was incompetent and should be disregarded, is not open to review here. However, if it were, the language of Mr. Justice McReynolds in the case of *Garrett vs. Louisville & Nashville Railroad Co.*, 235 U. S., 308, would seem to be applicable. He there said:

> "* * * If the proofs go to matters not set up therein (the pleadings), the court cannot judicially act upon them as a ground for decision, for the pleadings do not put them in contestation."

It has been held by this court that even a federal constitutional objection may be waived so far as having the right of review of a judgment of a state court is concerned where the question is not made in the state court by proper procedure.

Chesapeake & Ohio Railroad Co. vs. McDonald, Admr., 214 U. S., 191.

Without any doubt, it rests with each state to prescribe its rules of practice.

John vs. Paullin, 231 U. S., 583.

Inasmuch as it does not appear from the record that the Supreme Court of Ohio decided a federal question, the writ of error in this case should be dismissed.

WALTER G. KIRKBRIDE,
C. H. MASTERS AND
KOHN, NORTHUP, RITTER & MCMAHON,
Attorneys for Defendant in Error.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY *v.* SLAVIN.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 147. Submitted January 20, 1915.—Decided February 23, 1915.

Where the ruling of the trial court in an action for personal injuries against a railroad company, that the state statute abolishing assumption of risk and contributory negligence applied, was reversed by the intermediate appellate court on the ground that the Federal Employers' Liability Act, which does not abolish such defenses, applied, and the highest court of the State reversed this judgment

without opinion, a controlling Federal question was necessarily involved and this court has jurisdiction to review under § 237, Judicial Code.

When the evidence shows that although the case was brought under the state statute plaintiff was injured while engaged in interstate commerce, the objection that he cannot recover under the Federal Employers' Liability Act is not a technical rule of pleading, but a matter of substance, and where there are substantive differences between the state and Federal statutes in regard to defences of assumption of risk and contributory negligence, proceeding under the former is reversible error.

88 Oh. St. 536, reversed.

THE facts, which involve the validity of a judgment for personal injuries obtained in the state court under the state statute and the application and effect of the Federal Employers' Liability Act, are stated in the opinion.

Mr. Clarence Brown and *Mr. Charles A. Schmettau* for plaintiff in error.

Mr. Walter G. Kirkbride and *Mr. C. H. Masters* for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

In the Court of Common Pleas of Lucas County, Ohio, Otto Slavin brought suit against the Railroad Company for injuries received by him on the night of August 19, 1910, while he was at work on a train in the Company's yard at Toledo. His declaration alleged that in the performance of his duty, and in pursuance of a custom known to the Defendant, he was riding on the side of a gondola car with his foot in the "stirrup" and his hands holding the grab-irons. He averred that while in that position and without fault on his part, he was struck by another car standing on the adjoining track which he did not and could not see in time to avoid the injury. He alleged that

the Company was guilty of negligence in laying and maintaining the yard tracks in close and dangerous proximity to each other; and that it was further negligent in failing to give him notice that the freight car was standing on the adjoining track. The defendant denied the charge of negligence. It contended that Slavin's duty did not require him to ride on the side of the car, but that, with a safe place in which to work, he voluntarily and unnecessarily rode, in a dangerous position, on the outside of a car passing through a railroad yard where he knew, or ought to have known, that trains and cars would be standing.

There was evidence that the plaintiff had been employed by the Company for about ten years—for much of that time being in charge of the switching engine which operated over every part of the yard—and that he was thoroughly familiar with the condition, situation and location of the tracks at the point where the injury occurred. Neither the plaintiff's complaint nor the defendant's answer contained any reference to the Employers' Liability Act. But, over plaintiff's objection, evidence was admitted which showed that the train on which the plaintiff was riding, at the time of the injury was engaged in interstate commerce. Thereupon the Railroad Company insisted that the case was governed by the provisions of the Employers' Liability Act and moved the court to direct a verdict in its favor. That motion having been overruled the defendant asked the court to give in charge to the jury several applicable extracts from that Federal statute.

All these requests were refused, the trial judge being of the opinion that the proximity of the tracks constituted a defect in "rail, track or machinery" within the meaning of the Ohio statute; and that, although the plaintiff had notice of such defect, he was not debarred of the right to recover, in view of §§ 9017 and 9018 of the Ohio Code,

changing the common law rule as to contributory negligence and assumption of risks. There was a verdict for the plaintiff. The defendant's motion for a new trial was overruled. On writ of error the Circuit Court of Lucas County held that inasmuch as the plaintiff was injured while engaged in interstate commerce the case was governed by the Federal statute which did not repeal the common law rule of assumption of risks under circumstances like those set out in the record and that the defendant's motion for a directed verdict should have been granted. This judgment was reversed and that of the Court of Common Pleas affirmed, without opinion, by the Supreme Court of Ohio.

The case having been brought here by writ of error, counsel for the plaintiff, Slavin, insists that the judgment of reversal, without opinion, should not be construed as meaning that the state court decided the Federal question adversely to the Company's claim; but rather as holding that the defendant's failure to plead the Employers' Liability Act made it improper to consider evidence that the plaintiff had been engaged in interstate commerce and, hence, that there was nothing properly in this record to support the contention that the defendant had been deprived of a Federal right.

But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the state statute the defendant was entitled to disprove liability under the Ohio Act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law.

In this respect the case is much like *St. Louis &c. Ry.* v. *Seale*, 229 U. S. 156, 161, where the suit was brought

under the Texas statute, but the testimony showed that the plaintiff was injured while engaged in interstate commerce. The court said: "When the evidence was adduced it developed that the real case was not controlled by the state statute but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the state courts erred in overruling it." The principle of that decision and others like it is not based upon any technical rule of pleading but is matter of substance, where, as in the present case, the terms of the two statutes differ in essential particulars. Here the Ohio statute abolished the rule of the common law as to the assumption of risks in injuries occasioned by defects in tracks, while the Federal statute left that common law rule in force, except in those instances where the injury was due to the defendant's violation of Federal statutes, which,—like the Hours of Labor Law and the Safety Appliance Act,—were passed for the protection of interstate employés. *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 503.

In all other respects this case is exactly within the ruling in the case last cited, where the employé's knowledge of the existence of the defect and the terms of the state statute relied on were substantially the same as those in the present case. There the judgment of the state court—applying the state statute—was reversed because it appeared, as it does here, that the plaintiff had been injured while engaged in interstate commerce and, consequently, the case should have been tried and determined according to the Federal Employers' Liability Act.

The judgment of the Supreme Court of Ohio is reversed and the case remanded for further proceedings not inconsistent with this opinion.